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CHAPTER 11

Trade, Commercial Relations, Investment, and Transportation

A. TRANSPORTATION BY AIR

1. Bilateral Open Skies and Air Transport Agreements

Information on recent U.S. Open Skies and other air transport agreements, by country, is available at www.state.gov/e/eb/rls/othr/ata/index.htm. During 2013, activities on Open Skies included the following:

- On February 14, the United States and Russia agreed, *ad referendum*, on a protocol with attached annexes to replace the annexes to the 1994 Air Transport Agreement between the Government of the United States of America and the Government of the Russian Federation (the initialed protocol and annexes are available at www.state.gov/e/eb/rls/othr/ata/r/rs/205175.htm);
- On March 25, the United States and Guyana signed the U.S.-Guyana Air Transport Agreement, with entry into force upon signature (available at www.state.gov/e/eb/rls/othr/ata/g/gu/206955.htm);
- On May 28, the United States and Saudi Arabia signed an Open Skies air transport agreement which has been applied on the basis of comity and reciprocity since it was initialed in 2011 (agreement available at www.state.gov/e/eb/rls/othr/ata/s/sa/210079.htm);
- On July 8, the United States and Suriname signed an air transport agreement, available at www.state.gov/e/eb/rls/othr/ata/s/ns/212480.htm, that will enter into force upon an exchange of diplomatic notes confirming that all necessary internal procedures have been completed for entry into force;
- On August 15, the United States and Bangladesh reached *ad referendum* agreement on, and initialed the text of, an air transport agreement

(agreement available at
www.state.gov/e/eb/rls/othr/ata/b/bg/213413.htm).

2. Preclearance Agreement with the United Arab Emirates

The Agreement Between the Government of the United States of America and the Government of the United Arab Emirates on Air Transport Preclearance, with its Annex, and as amended, signed at Washington April 15, 2013, entered into force on December 8, 2013 after an exchange of notes between the two governments. The agreement allows travelers on non-stop flights to the United States who are pre-cleared at Abu Dhabi International Airport to be free from any further customs and immigration processing upon arrival in the United States. The text of the agreement and the exchange of notes bringing it into effect are available at www.state.gov/s/l/c8183.htm.

3. Addressing Aviation Impacts on Climate Change

For background on U.S. efforts to arrive at a multilateral approach to addressing aviation's impact on climate change and to prevent application of the European Union's Emissions Trading Scheme ("ETS"), see *Digest 2012* at 352-56 and *Digest 2011* at 358-59. At the 38th session of the Assembly of the International Civil Aviation Organization ("ICAO"), held September 24-October 4, 2013, members considered draft resolution 17/2, "Consolidated statement of continuing ICAO policies and practices related to environmental protection—Climate change." The United States delivered a statement of reservation regarding the resolution, which follows. The Report of the ICAO Executive Committee including the text of resolution 17/2 is available at www.icao.int/Meetings/a38/Documents/WP/wp430_en.pdf.

* * * *

In the United States, we have put addressing environmental challenges, including climate change, as one of the critical goals in the modernization of our national airspace system, and we have pioneered progress—in concert with industry—in the development and deployment of sustainable alternative fuels.

We are also committed to developing a global approach to address climate change.

During the last three years, the United States and others have taken important steps to move forward from 2010. In large part, the climate resolution reflects the progress we have made and moves us forward on a comprehensive approach to addressing the impacts of aviation on climate change. We are supportive of the resolution provisions on technology standards, operational improvements, and sustainable alternative jet fuels.

We also support moving forward on work to develop a global market-based measure for international aviation. A global market-based measure would serve to complement the many other efforts that ICAO and its member States are undertaking to reduce aviation emissions. We look forward to working diligently on this task over the next three years.

Despite support for the global approach and work on the global market-based measure, we do have concerns related to some provisions of this resolution. We are reserving on paragraph 16(b) and guiding principle (p) in the annex.

Reservation on Paragraph 16(b)

With respect to paragraph 16(b), while the United States supports the concept of “de minimis” thresholds in principle, it does not believe that 1% is an appropriate threshold, that the threshold should be based on the aviation activities of states as opposed to operators, or that accommodations should depend upon whether routes are to or from developing States. These criteria amount to an inappropriate means of addressing the de minimis concept, particularly in light of ICAO’s principle of non-discrimination and commitment to the avoidance of market distortion. If applied, this de minimis threshold would have the effect of excluding the vast majority of the world’s countries from participation in an MBM. Consistent with the language of the provision, the United States sees such a threshold as having no bearing on the development of a global MBM. The United States reserves to Paragraph 16(b).

Reservation on Guiding Principle (p)

The United States objects to the inclusion of guiding principle (p) in the annex. For reasons that are well known, the United States does not consider that the principles of the United Nations Framework Convention on Climate Change, including the principle of “common but differentiated responsibilities and respective capabilities,” apply to ICAO, which is governed by its own legal regime. Accordingly, the United States reserves to guiding principle (p) in the Annex to this resolution.

* * * *

B. INVESTMENT DISPUTE RESOLUTION UNDER FREE TRADE AGREEMENTS

1. Investment Dispute Settlement under Chapter 11 of the North American Free Trade Agreement Involving the United States

a. Apotex, Inc. v. United States of America

On June 14, 2013, the Tribunal constituted to hear the dispute brought against the United States by Apotex Inc. issued its Award on Jurisdiction and Admissibility. Apotex Inc., a Canadian pharmaceuticals corporation, alleged that U.S. courts committed errors in interpreting federal law, and that those errors violated NAFTA Article 1102 (national treatment) and Article 1105 (minimum standard of treatment). Apotex also alleged that the challenged U.S. court decisions expropriated Apotex’s investments under NAFTA Article 1110. The June 14 Award dismisses all claims and orders Apotex to pay the United States’ legal fees and arbitral expenses. The Tribunal considered and discussed objections to jurisdiction based on the lack of an “investment” or “investor;” the lack of judicial finality; and the time bar. The Award and other documents in the matter are available at www.state.gov/s/l/c27648.htm. Excerpts follow from the Tribunal’s Award (with footnotes omitted).

* * * *

(B) NO “INVESTMENT” OR “INVESTOR”

* * * *

243. Apotex has failed to establish that it made or sought to make an “*investment*” in the United States. It therefore does not qualify as an “*investor*” under NAFTA Article 1116.

244. Apotex’s activities with respect to the contemplated sales of its sertraline and pravastatin products in the United States are those of an exporter, not an investor. As such, the position is analogous to that in *Grand River Enterprises, Inc. v. United States*, where the tribunal found that: “claimants activities centered on the manufacture of cigarettes at Grand River’s manufacturing plant in Canada for export to the United States,” and, as a result, determined that: “such activities and investments by investors in the territory of one NAFTA party do not satisfy the jurisdictional requirements for a claim against another NAFTA party.”

245. Apotex, like any company that intends to export generic drug products to the United States for sale in the U.S. market, sought regulatory approval from the FDA through the submission of [Abbreviated New Drug Applications or] ANDAs. But this process cannot change the nature of the underlying activity, or constitute an “investment” in and of itself, within the meaning and scope of NAFTA Article 1139.

246. It follows that the Tribunal lacks jurisdiction over Apotex’s claims, which must be dismissed in their entirety.

247. This is a complete answer to all of Apotex’s claims in both cases before this Arbitral Tribunal, such that, strictly, there is no need for the Arbitral Tribunal to consider the Respondent’s two remaining objections. However, since each of the remaining objections was the subject of detailed written and oral argument, the Arbitral Tribunal considers it appropriate to address them.

* * * *

(C) JUDICIAL FINALITY WITH RESPECT TO THE PRAVASTATIN CLAIM

* * * *

260. In line with both Parties’ approach, the Tribunal proceeds on the basis that this objection concerns the Tribunal’s jurisdiction *ratione materiae*. In the alternative, the Tribunal has also considered the matter in terms of the admissibility of claims.

261. *Relevant Chronology*: It is clear, as a matter of fact, that two further avenues of recourse within the U.S. judicial system were available to Apotex, and that Apotex elected not to pursue them.

262. First, Apotex never sought review in the U.S. Supreme Court of the pravastatin-related decisions by the U.S. Court of Appeals. In fact, none of the pravastatin-related judicial acts now relied upon by Apotex as breaching U.S. obligations under the NAFTA was finally reviewed within the U.S. judicial system.

263. Second, Apotex voluntarily agreed to the dismissal of its entire pravastatin claim in the U.S. courts, most of which was dismissed with prejudice, instead of proceeding at the District Court level.

* * * *

267. Stated thus, the judicial acts now challenged by Apotex in its Pravastatin Claim do not appear as “final” manifestations of justice within the U.S. judicial system such as to allow for international law claims—because Apotex still had other options to pursue.

268. The key issue is therefore the basis upon which Apotex elected not to exhaust all available remedies, and whether such remedies were (according to the Parties’ common test) “*obviously futile*”.

269. *Application to the U.S. Supreme Court:* Apotex explains that after the FDA issued its letter decision on 11 April 2006 (refusing to treat the BMS - Apotex dismissal as a triggering court decision), Apotex promptly sought injunctive relief from the District Court. After the D.C. District Court denied Apotex’s motion, the FDA then approved Teva’s ANDA on 24 April 2006. Teva immediately launched its respective ANDA products, thereby triggering the 180-day exclusivity period, which would expire on 23 October 2006. Apotex immediately appealed the District Court’s decision and Teva moved for summary affirmance.

* * * *

270. As already noted, on 6 June 2006, the D.C. Circuit summarily affirmed the District Court’s decision on Apotex’s motion for a preliminary injunction. Apotex petitioned for rehearing of that decision, which the D.C. Circuit denied on 17 August 2006. At that point, the case returned to the D.C. District Court for further proceedings on the merits, on a non-expedited basis.

271. The core point, as far as Apotex is concerned, is that once its petition for rehearing *en banc* was denied, only 67 days remained of Teva’s 180-day exclusivity period. After this period expired (i.e., on 23 October 2006), Apotex would then be eligible for final approval of its pravastatin ANDA—regardless of the outcome of its case.

272. Moreover, even if Apotex had eventually succeeded on the merits on or after that date, Apotex would not have been entitled to damages from the FDA, or any other party for that matter. Thus, once the 180-day exclusivity period had expired, Apotex would no longer be able to obtain any meaningful or effective relief from either the FDA or the Courts.

273. Therefore, against these facts, Apotex submits that it should not have been required to petition for *certiorari* requesting expedited relief to overturn the D.C. Circuit’s summary Affirmance—particularly given that the decision by the D.C. Circuit Court related solely to Apotex’s request for injunctive relief, and was not a full decision on the merits.

274. Further, Apotex submits that it is wholly unrealistic to suppose that the Supreme Court would not only have granted the petition, but could have scheduled argument and render an opinion in Apotex’s favour within 67 days. Any efforts to achieve such a result would have been “objectively futile”.

275. Had Apotex immediately petitioned the Supreme Court for *certiorari*, under the relevant U.S. Supreme Court rules, the FDA would have had 30 days from the date the case was docketed to submit a response, after which Apotex would have had an additional 10 days to reply. Thus, Apotex argues that the Supreme Court Clerk could not even have distributed Apotex’s petition to the Supreme Court until less than a month was left in Teva’s exclusivity period. Thus, the Court would not have granted the petition, ordered briefing and a hearing, and decided the matter at any time before 23 October 2006, when the relief requested would have been rendered moot.

276. The Tribunal has sympathy for Apotex's position, and can readily appreciate that a judgment call was taken at the time that petitioning the U.S. Supreme Court was unlikely to secure the desired relief. However, as the Respondent has observed, under established principles, the question whether the failure to obtain judicial finality may be excused for "obvious futility" turns on the unavailability of relief by a higher judicial authority, not on measuring the likelihood that the higher judicial authority would have granted the desired relief. In this case, and on balance, the Tribunal is not satisfied that finality was achieved, such as to allow for a claim under NAFTA in respect of the particular judicial decisions in question.

277. The starting point is to recall the very serious nature of the allegations against the U.S. judicial system in Apotex's Pravastatin Claim. Apotex asserts that the U.S. District Court for the District of Columbia, and the U.S. Court of Appeals for the D.C. Circuit, administered justice so deficiently as to violate Apotex's rights under the U.S. Constitution, and to put the United States in breach of its international law obligations under the NAFTA. Yet, at the same time (and notwithstanding the gravity of the alleged breaches), Apotex elected not to allow the U.S. Supreme Court all possible opportunities to correct the alleged errors and transgressions. Instead, Apotex now requests that this Tribunal—in effect—substitute itself for the U.S. Supreme Court, and sit as a supranational appellate court, to review the judicial decisions of lower U.S. courts. The Tribunal declines to do so, for three reasons.

278. First, as a general proposition, it is not the proper role of an international tribunal established under NAFTA Chapter Eleven to substitute itself for the U.S. Supreme Court, or to act as a supranational appellate court. This has been repeatedly emphasised in previous decisions. For example:

(a) *Mondev Award*, at paragraph 126: "Under NAFTA, parties have the option to seek local remedies. If they do so and lose on the merits, it is not the function of NAFTA tribunals to act as courts of appeal."

(b) *Azinian Award*, at paragraph 99: "The possibility of holding a State internationally liable for judicial decisions does not, however, entitle a claimant to seek international review of the national court decisions as though the international jurisdiction seised has plenary appellate jurisdiction. This is not true generally, and it is not true for NAFTA."

(c) *Waste Management Award*, at paragraph 129: "Turning to the actual reasons given by the federal courts, the Tribunal would observe that it is not a further court of appeal, nor is Chapter 11 of NAFTA a novel form of amparo in respect of the decisions of the federal courts of NAFTA parties."

279. Second, and related to this, the "obvious futility" threshold is a high one. This necessarily follows from the nature of the rule to which it is an exception.

280. The requirement that local judicial remedies be exhausted before judicial acts may found an international complaint was said by both Parties to flow from two sources: (a) NAFTA Article 1101, by which any impugned act must be a "measure adopted or maintained" by the host State (and the proposition that a judicial act is not a measure adopted or maintained by the State unless "final"); and (b) customary international law, as applicable by virtue of NAFTA Article 1131, which provides that: "A tribunal established under this section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law."

281. As a matter of customary international law, both Parties asserted that an act of a domestic court that remains subject to appeal has not ripened into the type of final act that is sufficiently definite to implicate State responsibility—unless such recourse is obviously futile. As summarised on behalf of the Respondent:

“The finality requirement is fundamental to claims that may result in holding a State’s Judiciary in violation of international law. National judicial systems including those of the three NAFTA Parties, provide for higher courts to correct errors below. Decisions by higher courts harmonise the interpretation and application of the law by lower courts. A finding by an International Tribunal such as this one, that national courts violated international law implicates a systemic failure of the national judiciary. International law recognises, therefore, that the national court system must be given a chance to correct errors.”

282. Although both Parties asserted that this rule applies to all causes of action premised upon judicial acts, both Parties primarily invoked authorities concerning denial of justice claims. Such claims depend upon the demonstration of a systemic failure in the judicial system. Hence, a claimant cannot raise a claim that a judicial act constitutes a breach of international law, without first proceeding through the judicial system that it purports to challenge, and thereby allowing the system an opportunity to correct itself. In the words of Jan Paulsson, *Denial of Justice in International Law* 108 (2005): “For a foreigner’s international grievance to proceed as a claim of denial of justice, the national system must have been tested. Its perceived failings cannot constitute an international wrong unless it has been given a chance to correct itself.”

And as stated in *Loewen Group v. United States*:

“The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.”

* * * *

284. Because each judicial system must be allowed to correct itself, the “obvious finality” exception must be construed narrowly. It requires an actual unavailability of recourse, or recourse that is proven to be “manifestly ineffective”—which, in turn, requires more than one side simply proffering its best estimate or prediction as to its likely prospects of success, if available recourse had been pursued.

285. It is not enough, therefore, to allege the “absence of a reasonable prospect of success or the improbability of success, which are both less strict tests.” In the (frequently quoted) words of Professor Borchard, a claimant is not: “relieved from exhausting his local remedies by alleging ... a pretended impossibility or uselessness of action before the local courts.”

* * * *

287. Third, on the facts of this case, even if the chance of the U.S. Supreme Court agreeing to hear Apotex’s case was remote, the availability of a remedy was certain. Pursuant to 28 U.S.C. § 1254(1), Apotex could have sought U.S. Supreme Court review on an expedited basis of the Court of Appeals decision on injunctive relief, even after its petition for rehearing *en banc* was denied.

288. As against this, Apotex submits that because the chances of a successful outcome were “unrealistic”, a petition to the U.S. Supreme Court was “objectively futile”, or to be treated as if unavailable. In effect, the Tribunal is being asked to determine the likelihood of a successful

result before the U.S. Supreme Court—which the Tribunal does not consider is its proper task, or indeed the correct enquiry. In the words of Judge Lauterpacht, in *Norwegian Loans* case: “[H]owever contingent and theoretical these remedies may be, an attempt ought to have been made to exhaust them.”

* * * *

291. Pursuing the Claim at District Court Level: As to the Respondent’s argument that Apotex should have pressed onward with its claim at the District Court level, Apotex submits that the D.C. District Court had already denied Apotex’s request for emergency relief, which the D.C. Circuit affirmed on appeal. Thus, at the District Court level, Apotex would have been forced to proceed at the standard litigation pace, as expedited relief was no longer an option.

292. On remand, the District Court scheduled a status hearing to be held on 6 October 2006. On 3 October 2006, a mere 20 days before Teva’s exclusivity period expired, Apotex voluntarily dismissed its suit. According to Apotex, even if it had immediately filed a summary judgment motion after the 6 October 2006 status conference, under the local rules of that District Court, the time permitted to fully brief the matter would have extended beyond the date the issue became moot on 23 October 2006.

293. Once again, however, the Tribunal does not consider that Apotex has met the “obvious futility” exception here.

294. The Tribunal is not persuaded that pursuing substantive relief on remand would have been “*absurd*”, because Apotex “*would have been forced to proceed at standard litigation pace, as expedited relief was no longer an option.*” Just as Apotex had sought expedited consideration of its appeal (on the interlocutory issue) before the D.C. Circuit, it remains unclear why it could not have sought expedited consideration of its claim on the merits before the D.C. District Court. On any view, it made no attempt to do so.

295. Further, after the D.C. Circuit rejected Apotex’s petition for rehearing *en banc* on 17 August 2006, Apotex waited 47 days (until 3 October 2006) before voluntarily dismissing all of its claims against the FDA.

296. Further still, as is clear from its Stipulation of Dismissal, Apotex dismissed all claims “with prejudice” for 10, 20, and 40 mg strengths, but “without prejudice” for the 80 mg strength. As the Respondent notes, the 180-day exclusivity period for 80 mg generic pravastatin had not yet begun to run, because Ranbaxy (the company that had been awarded the 180-day exclusivity for 80 mg generic pravastatin) had not yet launched that strength. Ranbaxy did not in fact do so until 25 June 2007. Importantly, Apotex preserved its ability to continue litigating before the District Court with respect to 80 mg pravastatin—but it never did.

* * * *

(D) THE NAFTA TIME BAR

* * * *

318. *Claims Based on the FDA Decision Itself:* In so far as Apotex seeks to advance any claim based exclusively on the FDA decision of 11 April 2006, this clearly falls outside of the NAFTA three-year limitation period, and is therefore time-barred. In other words, Apotex

cannot now assert that the FDA decision constituted—in and of itself—a breach of NAFTA Articles 1102, 1105, and 1110.

319. Contrary to Apotex’s subsequent submissions, this is a claim that was in fact pleaded in terms in the Pravastatin Notice of Arbitration.

320. It is clear that in April 2006 Apotex already had knowledge of the FDA measure and knowledge of any resulting loss or damage allegedly arising from it. According to its own pleading, Apotex’s inability to bring its pravastatin products to market in April 2006 (by which time, in Apotex’s view, the market exclusivity period held by the first paragraph IV applicants should have expired) caused Apotex “*to suffer substantial damages.*”

321. Apotex further alleges in its Statement of Claims that the ability of the first paragraph IV applicants to launch their generic pravastatin products while enjoying market exclusivity in April 2006 enabled those companies to “secur[e] a stranglehold over the market.”

322. Apotex even pre-emptively challenged the FDA measure in court on 5 April 2006, claiming that Apotex had been “adversely affected by final agency action and/or agency action unlawfully withheld.”

323. And yet Apotex delayed submitting its Pravastatin Notice of Arbitration until 5 June 2009. There is no obvious reason why Apotex could not have made its claims regarding the FDA measure in a timely manner. The FDA decision was taken in April 2006. All U.S. litigation over the measure ended in August 2006, and Apotex voluntarily dismissed all claims relating to the measure in October 2006. Apotex then had ample time to bring its NAFTA claim challenging the FDA decision. Indeed, Apotex brought its Sertraline Claim on 11 December 2008, which, had it included the Pravastatin Claim, would have been within the required time limit.

324. Accordingly, the Tribunal accepts the Respondent’s submission that by reason of NAFTA Article 1116(2), all claims based exclusively upon the FDA decision of 11 April 2006 are time-barred, and so must be dismissed.

325. Apotex cannot avoid this conclusion by asserting that the FDA measure is part of a “continuing breach” by the United States, or “part of the same single, continuous action,” in so far as this is intended as a mechanism to use later court proceedings to toll the limitation period for the earlier FDA measure.

* * * *

333. Claims Based on the 6 June & 17 August 2006 D.C. Decisions: Having so ruled, it must be made clear that there is no time-bar difficulty with respect to Apotex’s claims based upon the 6 June 2006 and 17 August 2006 decisions of the D.C. Circuit. And clearly, any claim that these judicial decisions constituted a breach of the NAFTA would require at least some consideration of the prior administrative and judicial decisions.

334. But the two types of claim are clearly analytically distinct. One is a claim that a breach occurred, and loss was incurred, as at 11 April 2006, by reason of the FDA’s (administrative) ruling that the dismissal of Apotex’s declaratory judgment action against the patent owner did not constitute a “court decision trigger”. The other is a claim that a breach occurred, and loss was incurred, as at 6 June 2006, or alternatively 17 August 2006, by reason of the (judicial) decisions of the Court of Appeals for the D.C. Circuit.

* * * *

b. Apotex Holdings Inc. and Apotex Inc. v. United States of America

As discussed in *Digest 2012* at 356-60, the United States filed its Counter-Memorial and Objections to Jurisdiction, including a request for bifurcation, in the arbitration initiated by Apotex and Apotex Holdings in 2012 alleging injuries arising out of “Import Alerts” issued by the FDA concerning two of Apotex’s Canadian manufacturing facilities. On January 25, 2013, the tribunal in the case issued its order denying the request for bifurcation and directing that jurisdictional and liability issues (but not damages) be presented at an oral hearing in November. Claimants replied to the U.S. Counter-Memorial on May 24, 2013. The United States submitted a rejoinder on the merits and a reply on jurisdiction on September 27, 2013. Excerpts below from the rejoinder (with most footnotes omitted) address the issue of *res judicata*. The rejoinder is available at www.state.gov/documents/organization/217858.pdf. The hearing on jurisdiction and the merits took place in November 2013. Transcripts of the hearing and other relevant documents are available at www.state.gov/s/l/c50826.htm.

* * * *

99. Consistent with the principle of *res judicata*, this Tribunal should give effect to the decision of the *Apotex I-II* tribunal and dismiss Apotex Inc.’s claim for lack of jurisdiction. *Res judicata*, which includes the principle of issue estoppel, precludes relitigation of an issue of fact or law decided between two parties.

100. *Res judicata*—which applies to these proceedings pursuant to NAFTA’s governing law provision—is a well-established general principle of international law. As early as 1905, the French-Venezuelan Mixed Claims Commission recognized:

The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed.²²⁵

101. Over the ensuing century, international courts and tribunals repeatedly have applied this general principle in order to promote the twin goals of efficiency and finality. These include the Permanent Court of International Justice (e.g., in *Chorzów Factory*), the International Court of Justice (e.g., in *Land and Maritime Boundary Between Cameroon and Nigeria*), interstate arbitral tribunals (e.g., in *UK-French Continental Shelf*), and investor-State arbitral tribunals (e.g., in *Amco Asia v. Indonesia*).

²²⁵ *Company General of the Orinoco Case*, Award (July 31, 1905), 10 UNRIAA 184, 276 (emphasis altered) (citing *Southern Pacific Railroad Co. v. United States*, 168 SCR 1) [RLA-267].

102. The International Law Association (ILA) more recently confirmed the crucial role *res judicata* plays in promoting efficiency and finality in international commercial arbitration. The ILA's "Recommendations on *Res Judicata* and Arbitration" recognize that an arbitral award is conclusive and preclusive where it (1) has become final and binding; (2) has disposed of a claim for relief sought or reargued in further arbitral proceedings; (3) is based upon the same cause of action in subsequent proceedings or forms the basis for subsequent proceedings; and (4) has been rendered between the same parties. The ILA further recommended that arbitral awards have conclusive and preclusive effects in subsequent arbitral proceedings as to:

- 4.1 determinations and relief contained in its dispositive part as well as in all reasoning necessary thereto; and
- 4.2 issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award.

103. Recommendation 4.1 endorses the more extensive notion "followed in public international law, under which *res judicata* not only is to be read from the dispositive part of an award but also from its underlying reasoning." Recommendation 4.2 "endorses common law concepts of issue estoppel, which for reasons of procedural efficiency and finality, seem to be acceptable on a worldwide basis, notwithstanding the fact that they are yet unknown in civil law jurisdictions." The ILA Final Report confirmed that issue estoppel applies not only to the same claim, but also to "different claims in further arbitral proceedings."

104. Issue estoppel also is widely recognized in domestic law. In the United States and Canada, for instance, a party is precluded from relitigating the same issue between the same parties in a different suit involving a different cause of action if a court has finally decided that issue.

105. Here, Apotex Inc.'s claims fall squarely within the ILA's Recommendations on *Res Judicata* and Arbitration. *First*, the parties are the same. In both cases, Apotex Inc. is a claimant, and the United States is the respondent.

106. *Second*, the issue in both arbitrations is the same, notwithstanding the different claims raised on the merits. In both cases, Apotex Inc. contends that it qualifies as an "investor" whose ANDAs constitute "investments" in the United States for purposes of NAFTA Articles 1116 and 1139.

107. *Third*, the issue of whether Apotex Inc. is a qualifying "investor" with covered "investments" was fully arbitrated and determined in the *Apotex I-II* claims. The tribunal in that case rendered a lengthy, reasoned decision after two rounds of briefing and an oral hearing.

108. *Fourth*, the *Apotex I-II* tribunal decided the issue in a final and binding award. The tribunal's unanimous decision addressed the issue in its operative part as well as in the associated reasoning and was essential to its *dispositif*.

109. Although Apotex has presented additional argument in this case to try to bolster its jurisdictional claim, issue estoppel precludes relitigation of the *entire issue*, not simply arguments raised in connection with that issue in the prior case. Were it otherwise, any party could evade the preclusive effect of issue estoppel simply by devising new legal arguments for repeated cases that raise the same issues.

110. In sum, in accordance with the well-established principle of *res judicata*, which includes issue estoppel, Apotex should be barred “from contradicting an issue of fact or law that has already been distinctly and finally decided in earlier proceedings between the same parties.”

* * * *

2. Non-Disputing Party Submission under Chapter 11 of the North American Free Trade Agreement

On April 19, 2013, the United States made a submission pursuant to Article 1128 of the NAFTA as a non-disputing party in a case brought against the government of Canada, *Clayton/Bilcon v. Canada*. U.S. investors, members of the Clayton family and a corporation they control called Bilcon, filed a claim against Canada alleging that the type of environmental assessment undertaken with respect to the White Point Quarry and/or Marine Terminal Project, as well as the administration and conduct of the environmental assessment, violate NAFTA Article 1102 (national treatment), Article 1103 (most favored nation treatment), and Article 1105 (minimum standard of treatment). The U.S. submission is excerpted below (with most footnotes omitted) and is available in full at www.state.gov/documents/organization/208140.pdf.

* * * *

Article 1105 (Minimum Standard of Treatment)

2. On July 31, 2001, the Free Trade Commission (“Commission”), comprising the NAFTA Parties’ cabinet-level representatives, issued an interpretation confirming that “Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.” The Commission clarified that “[t]he concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.” The Commission also stated that “a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”

3. NAFTA Article 1131, entitled “Governing Law,” states in part that “[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.” The power to issue an authentic interpretation of a treaty remains with the States Parties themselves.

4. The Commission’s interpretation confirms the NAFTA Parties’ express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. As the United States has observed in previous submissions in NAFTA Chapter Eleven cases, the minimum standard of treatment is an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in

specific contexts.⁶ Article 1105 thus reflects a standard that develops from State practice and *opinio juris*, rather than an autonomous, treaty-based standard. Although States may decide, expressly by treaty, to extend protections under the rubric of “fair and equitable treatment” and “full protection and security” beyond that required by customary international law, that practice is not relevant to ascertaining the content of the customary international law minimum standard of treatment.⁷ Arbitral decisions interpreting “autonomous” fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard required by Article 1105. While there may be overlap in the substantive protections both types of treaty provisions ensure, a claimant submitting a claim under an agreement such as NAFTA, in which fair and equitable treatment is expressly a part of the customary international minimum standard of treatment, still must demonstrate that the rights claimed are in fact a part of customary international law.

5. The burden is on a claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. “The party which relies on a custom,” therefore, “must prove that this custom is established in such a manner that it has become binding on the other Party.” Once a rule of customary international law has been established, the claimant must show that the State has engaged in conduct that violated that rule.¹⁰ Determining a breach of the minimum standard of treatment “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.”¹¹

6. Finally, the principle of “good faith” is not a separate element of the minimum standard of treatment embodied in the Agreement. It is well established in international law that good faith is “one of the basic principles governing the creation and performance of legal obligations,” but “it is not in itself a source of obligation where none would otherwise exist.”

Article 1102 (National Treatment)

7. NAFTA’s national treatment provision, Article 1102, is designed to prohibit discrimination on the basis of nationality. Article 1102 paragraphs (1) and (2) are not intended to prohibit all differential treatment among investors or investments. Rather, they are intended only

⁶ See, e.g., *Methanex v. United States*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, NAFTA/UNCITRAL (Nov. 13, 2000); *ADF Group Inc. v. United States*, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and Pope & Talbot, NAFTA/ICSID Case No. ARB(AF)/00/1 (June 27, 2002); *Glamis Gold Ltd. v. United States*, Counter-Memorial of Respondent United States of America, NAFTA/UNCITRAL (Sept. 19, 2006); *Grand River Enters. v. United States*, Counter-Memorial of Respondent United States of America, NAFTA/UNCITRAL (Dec. 22, 2008).

⁷ See, e.g., *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶¶ 607-08 (June 8, 2009) (concluding that “arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom”); see also *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* 2012 I.C.J. ¶ 55 (Judgment of Feb. 3) (“While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.”).

¹⁰ See *Feldman v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) (“[I]t is a generally accepted canon of evidence in civil law, common law, and in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.”).

¹¹ *S.D. Myers v. Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 263 (Nov. 13, 2000).

to ensure that Parties do not treat entities that are “in like circumstances” differently based on their domestic nationality. If the challenged measure, whether in law or in fact, does not treat foreign investors or investments less favorably than domestic investors or investments on the basis of nationality, then there can be no violation of Article 1102.

8. The phrase “in like circumstances” ensures that comparisons are made with respect to investors or investments on the basis of characteristics that are relevant for purposes of the comparison. Thus, identifying appropriate domestic comparators for purposes of the “in like circumstances” analysis under Article 1102 is a highly fact-specific inquiry, requiring consideration of more than just the business or economic sector, but also the regulatory framework and policy objectives, among other possible relevant characteristics.

9. Nothing in Article 1102 paragraphs (1) and (2) requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best or most favorable treatment given to any domestic investor or investment. The relevant comparison is between the treatment that a Party accords to an investment of an investor of another Party and the best treatment that it accords to the investments of its nationals (or between the treatment that it accords to an investor of another Party and the best treatment that it accords to investors that are its nationals) only if the foreign investment or investor and a domestic investment or investor are in like circumstances. This distinction is important and was intended by the Parties. Thus, a NAFTA Party may adopt measures that draw legitimate distinctions among entities without necessarily violating Article 1102.

10. The national treatment obligation does not, as a general matter, prohibit a Party from adopting or maintaining measures that apply to or affect only a part of its national territory. The NAFTA Parties did not intend Article 1102 to foreclose the use of location-based regulatory measures. The United States, for example, limits business activities in certain environmentally sensitive areas and imposes additional limitations on emissions from manufacturing operations in areas where air pollution is more serious.

11. For the foregoing reasons, an investor or investment that operates within the territory covered by a location-specific measure may not be in circumstances “like” those of an investor or investment that does not operate within that territory. Therefore, an investor cannot rest its claim under Article 1102 on the fact that a domestic enterprise operating in another part of the country receives a different or greater benefit or is subject to a different or lesser burden unless it is “in like circumstances” with that enterprise.

Article 1116(2) (Limitations Period)

12. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Articles 1116(2) and Article 1117(2).¹⁵ Although a legally distinct injury can give rise to a separate limitations period under NAFTA Chapter Eleven, a continuing course of conduct does not extend the limitations period under Article 1116(2) or Article 1117(2).

* * * *

C. WORLD TRADE ORGANIZATION

1. Dispute Settlement

U.S. submissions in WTO dispute settlement proceedings are available at www.ustr.gov/trade-topics/enforcement/dispute-settlement-proceedings/wto-dispute-settlement. The following discussion of a selection of WTO dispute settlement proceedings involving the United States in 2013 is drawn largely from Chapter II “The World Trade Organization” of the 2013 Annual Report of the President of the United States on the Trade Agreements Program (“2013 Annual Report”), available at www.ustr.gov/about-us/press-office/reports-and-publications/2014-0. WTO legal texts referred to below are available at www.wto.org/english/docs_e/legal_e/legal_e.htm.

a. *Disputes brought by the United States*

(1) *China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States (DS427)*

As discussed in *Digest 2011* at 372-73, the United States requested the establishment of a panel to consider anti-dumping and countervailing duty measures imposed by China on imports of chicken broiler products from the United States. The panel issued its report on August 2, 2013, upholding most of the U.S. claims. As summarized in the 2013 Annual Report at 64, the panel “found MOFCOM’s substantive determinations and procedural conduct in levying the duties was inconsistent with China’s WTO obligations.” China and the United States agreed to a period, ending on July 9, 2014, for implementation of the panel’s findings.

(2) *Indonesia – Import Restrictions on Horticultural Products, Animals, and Animal Products (DS455 and DS465)*

As discussed in the 2013 Annual Report at 72-73, the United States and New Zealand each requested and held consultations with Indonesia in 2013 concerning its non-automatic import licensing requirements and quotas that impede trade in horticultural products, animals, and animal products. The affected products include fruits, vegetables, flowers, dried fruits and vegetables, juices, beef and other animal product imports. Consultations held in September 2013 failed to resolve concerns that the measures appear to be inconsistent with Article XI:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and Article 4.2 of the Agreement on Agriculture.

The United States has not requested the establishment of a panel and continues to work with Indonesia to ensure compliance with WTO obligations.

b. Disputes brought against the United States

(1) Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products (WT/DS381)

As discussed in *Digest 2011* at 375-76, the WTO panel in this case issued its report in 2011. Both Mexico and the United States appealed and the Appellate Body issued its report in 2012. See *Digest 2012* at 378-79. The 2013 Annual Report at 86 describes subsequent steps in 2013 in response to the recommendations and rulings of the WTO Dispute Settlement Body (“DSB”):

On July 23, 2013, the United States announced that it had fully complied with the DSB’s recommendations and rulings through a final rule of the Department of Commerce’s National Oceanic and Atmospheric Administration (NOAA) that came into effect on July 13, 2013. The final rule enhances the documentary requirements for certifying that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught outside the Eastern Tropical Pacific.

On November 25, 2013, Mexico requested that the DSB establish a panel to determine whether the U.S. dolphin-safe labeling provisions, as amended by the new final rule, are consistent with U.S. WTO obligations. Mexico’s request makes claims under Articles 2.1 and 2.2 of the TBT Agreement and Articles III:4 and XXIII:1(b) of the GATT 1994.

(2) Zeroing

As discussed in *Digest 2011* at 377, a DSB panel report issued in 2011 in *Antidumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil (DS382)* found the use of “zeroing” in antidumping reviews by the United States to be inconsistent with WTO obligations. As reported in the 2013 Annual Report at 87, the U.S. Department of Commerce issued notices in the Federal Register in 2012 modifying its procedures in accordance with DSB recommendations regarding “zeroing” and revoked the antidumping duty on the orange juice products from Brazil at issue in this dispute. Accordingly, the United States and Brazil notified the DSB that on February 14, 2013, they had reached a settlement in the dispute.

The United States also informed the DSB in 2013 of U.S. compliance with DSB recommendations in another dispute concerning zeroing: *Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China (DS422)*. See 2013 Annual Report at 93.

(3) *Certain Country of Origin Labeling (COOL) Requirements (Canada) (DS384) and (Mexico) (DS386)*

As discussed in *Digest 2011* at 376-77, a panel issued its report on disputes brought separately by Canada and Mexico challenging U.S. country of origin labeling (“COOL”) requirements. The Appellate Body issued its findings in 2012. See *Digest 2012* at 379. The 2013 Annual Report at 88-89 describes implementation of the DSB’s recommendations:

On May 24, 2013, the United States announced that it had fully implemented the DSB’s recommendations and rulings through a new final rule issued by USDA on May 23, 2013. The final rule modifies the labeling provisions for muscle cut covered commodities to require the origin designations to include information about where each of the production steps (i.e., born, raised, slaughtered) occurred and removes the allowance for commingling.

On September 25, 2013, at the request of both Canada and Mexico, the DSB referred the matter to a compliance panel to determine whether the amendments made by the United States are consistent with WTO obligations.

(4) *Measures Affecting the Production and Sale of Clove Cigarettes (DS406)*

See *Digest 2012* at 381 for a discussion of the Appellate Body’s findings in this case. As discussed in the 2013 Annual Report at 91-92, Indonesia continued to challenge U.S. actions with regard to the sale of clove cigarettes in 2013:

At the DSB meeting on July 23, 2013, the United States stated that it had fully implemented the DSB’s recommendations and rulings..., but Indonesia did not agree. On August 12, 2013, Indonesia filed a request for authorization to suspend concessions or other obligations under Article 22.2 of the DSU. In a communication dated August 22, 2013, the United States objected to Indonesia’s request, thereby referring the matter to arbitration. The Arbitrator is composed of the members of the original Panel: Mr. Ronald Saborío, Chair; and Mr. Ichiro Araki and Mr. Hugo Cayrús (Uruguay), members. The Arbitrator is expected to issue its award in 2014.

2. **WTO Trade Facilitation Agreement**

On December 7, 2013, the Ministerial Conference of the WTO in Bali concluded a Trade Facilitation Agreement. The text of the agreement is available at www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm. The new agreement was reached after nine years of negotiations and at the end of a five-day ministerial that addressed development of smaller countries, trade streamlining, and food security improvement. The agreement provides for faster and more efficient customs

procedures and for technical assistance and capacity building in this area. See the Office of the U.S. Trade Representative (“USTR”) press office blog post on the agreement, available at www.ustr.gov/about-us/press-office/blog/2013/December/what-theyre-saying-WTO-trade-facilitation-agreement.

President Obama welcomed the new deal, which he said, “will eliminate red tape and bureaucratic delay for goods shipped around the globe. Small businesses will be among the biggest winners, since they encounter the greatest difficulties in navigating the current system. By some estimates, the global economic value of the new WTO deal could be worth hundreds of billions of dollar.” President Obama’s statement is available in full at www.whitehouse.gov/the-press-office/2013/12/08/statement-president-world-trade-organization-trade-agreement.

D. OTHER TRADE AGREEMENTS AND TRADE-RELATED ISSUES

1. Free Trade Agreements

a. *Trans-Pacific Partnership*

On December 10, 2013, a four-day ministerial meeting of the Trans-Pacific Partnership (“TPP”) countries concluded with substantial progress being made toward the conclusion of a trade and investment agreement. The statement issued by the ministers and heads of delegation for the TPP countries at the conclusion of their meetings in Singapore on December 10 appears below and is available at www.ustr.gov/tpp, along with other information including a briefing by U.S. Trade Representative Michael Froman on December 10, 2013 on the progress made in Singapore on the TPP agreement.

* * * *

We, the Ministers and Heads of Delegation for Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam, have just completed a four-day Ministerial meeting in Singapore where we have made substantial progress toward completing the Trans-Pacific Partnership agreement.

Over the course of this meeting, we identified potential “landing zones” for the majority of key outstanding issues in the text. We will continue to work with flexibility to finalize these text issues as well as market access issues.

For all TPP countries, an ambitious, comprehensive and high-standard agreement that achieves the goals established in Honolulu in 2011 is critical for creating jobs and promoting growth, providing opportunity for our citizens and contributing to regional integration and the strengthening of the multilateral trading system.

Therefore, we have decided to continue our intensive work in the coming weeks toward such an agreement. We will also further our consultations with stakeholders and engage in our respective political processes.

Following additional work by negotiators, we intend to meet again next month.

* * * *

b. *Trans-Atlantic Trade and Investment Partnership*

On March 20, 2013, the Obama administration notified the U.S. Congress of its intent to enter into negotiations on a comprehensive trade and investment agreement with the European Union. The notification letter to Congress is available at www.ustr.gov/sites/default/files/03202013%20TTIP%20Notification%20Letter.PDF. On February 13, 2013, President Obama and European Union leaders announced their intent to pursue talks toward a Transatlantic Trade and Investment Partnership (“T-TIP” or “TTIP”). The joint statement from President Obama, European Council President Herman Van Rompuy and European Commission President José Manuel Barroso is available at www.ustr.gov/about-us/press-office/press-releases/2013/february/statement-US-EU-Presidents. Three rounds of negotiations were concluded in 2013 on the proposed agreement. A USTR fact sheet issued in June and available at www.ustr.gov/about-us/press-office/fact-sheets/2013/june/wh-ttip, lists key aspects of the agreement:

T-TIP will be an ambitious, comprehensive, and high-standard trade and investment agreement that offers significant benefits in terms of promoting U.S. international competitiveness, jobs, and growth.

T-TIP will aim to boost economic growth in the United States and the EU and add to the more than 13 million American and EU jobs already supported by transatlantic trade and investment.

In particular, T-TIP will aim to:

- Further open EU markets, increasing the \$458 billion in goods and private services the United States exported in 2012 to the EU, our largest export market.
- Strengthen rules-based investment to grow the world’s largest investment relationship. The United States and the EU already maintain a total of nearly \$3.7 trillion in investment in each other’s economies (as of 2011).
- Eliminate all tariffs on trade.
- Tackle costly “behind the border” non-tariff barriers that impede the flow of goods, including agricultural goods.
- Obtain improved market access on trade in services.
- Significantly reduce the cost of differences in regulations and standards by promoting greater compatibility, transparency, and

cooperation, while maintaining our high levels of health, safety, and environmental protection.

- Develop rules, principles, and new modes of cooperation on issues of global concern, including intellectual property and market-based disciplines addressing state-owned enterprises and discriminatory localization barriers to trade.
- Promote the global competitiveness of small- and medium-sized enterprises.

On April 25, 2013, Under Secretary of State for Economic Growth, Energy, and the Environment Robert D. Hormats delivered remarks on TTIP at Johns Hopkins University's Nitze School of Advanced International Studies ("SAIS"). His remarks, excerpted below, are available at

<http://iipdigital.usembassy.gov/st/english/texttrans/2013/04/20130425146420.html#axzz2tul3ybjB>.

* * * *

President Obama's announcement in the State of the Union address of the intention of the United States to negotiate a Transatlantic Trade and Investment Partnership, or TTIP, heralds a new era in the transatlantic relationship. The TTIP—if it works—will be a challenge, but one worth undertaking.

TTIP has the potential to be an historic agreement on many levels. Its scope is considerable. The TTIP seeks to create a more open market for 800 million consumers encompassing both sides of the Atlantic. And it will be very different from any trade agreement we have ever negotiated.

It will seek to break new ground by addressing a multitude of heretofore unaddressed non-tariff barriers, setting the stage for convergence between the United States and the EU on key standards and regulations, and establishing high quality norms and practices that can spread to other markets. It is also an opportunity to reaffirm and reinforce the strong economic, political, social and values we share with Europe.

Much as NATO was the glue that tied the United States and Europe together during the Cold War, TTIP can reflect and promote shared transatlantic interests and values that will bind us together more closely in the coming decades of the 21st century.

* * * *

So, we are on the cusp of beginning negotiations with the European Union on the Transatlantic Trade and Investment Partnership. This is a historically important project. It is also one that many previously thought was not possible. Some even argued that it was not even worth trying for, given the political, economic, regulatory, and cultural challenges on both sides of the Atlantic. And, some questioned, given the increasing role of Asia, why we should spend the time and effort on major trade negotiations with Europe.

In this context, I'd like to discuss two key considerations.

First: the rebalancing, or “pivot,” of U.S. foreign and economic policy to Asia has received much attention of late. But, as Vice President Biden remarked in Munich in February, our engagement with Asia does not come at Europe’s expense. Indeed, the Vice President noted that it is profoundly in Europe’s interest for the United States to engage more broadly with the world, and we should be doing many more of these things fully and actively together.

There is no denying the economic importance of Asia. It is an enormous economic priority for the United States—as it is for Europe. Indeed, I believe that both Europe and the United States will be in a stronger position to meet the competitive challenges of Asia if we have stronger economic ties with one another and if we agree on high common standards.

And second, strengthened economic ties between the United States and the European Union—and the benefits they produce for both of our economies—will enhance our ability to build stronger relationships with emerging economies in Asia and elsewhere around the world—relationships that support high quality norms and rules in the global economic system.

Why TTIP Can Succeed Now

As I noted a moment ago, TTIP is a mammoth undertaking. For decades there has been skepticism among Americans as to whether trade agreements benefitted the United States and whether the United States has the competitive strength to benefit from them. That said, however, Americans should approach both the TTIP and TransPacific Partnership—TPP—with a high degree of confidence.

- First, the Obama Administration has demonstrated that it can negotiate agreements that reflect the interests of a full range of American stakeholders. We have strengthened, and last year implemented, three major free trade agreements with Korea (KORUS), Columbia and Panama.
- Second, the administration has paid great attention to ensuring that our trading partners adhere to their commitments they make in these agreements. Moreover, we have strongly advocated for the interests of American companies when they encounter difficulties in any part of the world. We in the State Department have made advocacy in behalf of U.S. business and creating a level playing field for our companies a top priority.
- Third, the U.S. economy is growing steadily and creating private sector jobs here at home at a more rapid rate including, and importantly, in manufacturing—where jobs are beginning to return to the United States. March non-farm employment was up by 88,000, and we’ve enjoyed average monthly job growth of 169,000 over the past twelve months.
- Fourth, the oil and gas boom we are now enjoying has had profoundly positive economic and competitive effects. It improves our trade balance, puts more money in the hands of Americans to spend at home, improves our manufacturing capabilities, creates new export prospects, and makes the United States a more attractive place to invest.
- Fifth, we are finally seeing a real turnaround in American housing market, after a very difficult period—producing more stability for our overall economy and giving people more confidence about their own economic stability.
- Sixth, continued entrepreneurialism and innovation in the American economy is producing more and better goods and services—keeping our economy dynamic and highly competitive.
- Seventh, the President’s successful National Export Initiative has helped American companies take better advantage of access to foreign markets.

We also have had experience in a wide range of cooperative activities with the European Union on regulation and standards that will inform our upcoming TTIP negotiations.

The Transatlantic Economic Council, or TEC, continues to work in areas such as e-vehicles, e-health, nanotechnology and raw materials, to name a few, that create deeper transatlantic economic ties, tackle impediments to commerce, and shape global standards.

Benefits of TTIP

With the Transatlantic Trade and Investment Partnership, and all the enthusiasm it engendered from leaders on both sides, we hope to build on the important progress of the TEC in a larger and more systematic approach.

We aim to address entrenched obstacles to U.S.-EU trade liberalization—concerns over agricultural market access, risk assessment, management of sanitary and phytosanitary measures, and technical barriers to trade, among others.

A significant portion of the benefit of a potential transatlantic agreement turns on the ability of the United States and the EU to pursue new and innovative approaches to non-tariff barriers, with the aim of moving toward a more integrated transatlantic marketplace. This larger and more systematic approach that we are undertaking now—if it continues to be enthusiastically supported by leaders on both sides of the Atlantic—can make a big difference. And here let me emphasize that—as with past trade negotiations—the success of TTIP will depend on full-throated, sustained and enthusiastic leadership of the President and of his counterparts in Europe. And I believe we have both. It will also depend on very close cooperation with the Congress and constituencies throughout the United States. The same types of coordination must take place within Europe utilizing Europe’s institutional structures. I believe these are also well in train.

None of this will be easy. And both sides will have to be highly innovative. The U.S. and EU will need to explore new means of addressing “behind-the-border” obstacles to trade—through provisions to reduce unnecessary regulatory costs and administrative delays, while maintaining appropriate health, safety, and environmental protections.

A key shared objective should be to prevent non-tariff barriers from limiting the capacity of U.S. and EU firms to innovate and compete in global markets. The two sides should also seek to strengthen upstream cooperation by regulators and increase cooperation on standards-related issues.

Both we and the EU agree on the importance of promoting greater compatibility to resolve concerns and reduce burdens arising from existing regulations—possibly through such things as equivalence, mutual recognition, or other agreed means.

Importance of evidence-based regulations

Importantly, we seek regulatory compatibility that is based on transparent and evidence-based consultations and that will reduce burdens on both sides—while protecting consumer health, safety and the environment.

While sanitary and phyto-sanitary – or SPS — issues remain highly contentious, TTIP negotiations provide a real opportunity to break down some of the barriers that have kept us from taking full advantage of trade opportunities in the past. Our aim is for commitments to base SPS standards on science and international standards with an emphasis on scientific risk assessments. We also seek agreement to apply these only to the extent necessary to protect human, animal or plant life or health, to develop such measures in a transparent manner, and to establish an on-going mechanism for improved dialogue and cooperation addressing bilateral SPS issues. It will be essential for us to make significant progress on these issues and other key matters to reach a TTIP outcome that earns support from key stakeholders in the United States and in the EU.

Role of the State Department

The State Department is committed to working closely with our colleagues in USTR, which has the lead negotiating role in this effort. I used to be Deputy USTR in an earlier incarnation in government, and I work closely with USTR on many issues today. I have great confidence in their negotiating skills and in their commitment to the success of TTIP. We at State aim to play a robust and supportive role in these negotiations.

We have a considerable number of people with expertise not only in the traditional trade issues that will be discussed, but also in key 21st century areas that will be high on the agenda such as IPR, the environment, labor, investment, and rules related to state owned enterprises. We also have extensive legal and political expertise, built up over decades, with respect to EU member states and EU institutions.

And we will use the unique on-the-ground resources we have at our Embassies in the EU member states, and our mission in Brussels, to engage the EU Commission and proactively reach out to EU member state governments, parliamentarians, and other stakeholders in Europe to discuss the mutual goals and the benefits we see in TTIP.

Impact on Emerging Economies and the Global Trading System

Our objective in pursuing the TTIP is not only to strengthen economic ties with Europe—although that is our central objective. We see this as a way to strengthen economic ties with the rest of the world as well. This is an important dimension of these negotiations. TTIP could contribute to rules and disciplines between the United States and the EU that—if more broadly adopted—could be a catalyst for other trade liberalization initiatives. It could help shape practices, and norms throughout the global economy, strengthening the rules-based trading system from which all economies benefit.

Indeed for businesses in many emerging countries, the benefits of common U.S.-EU standards resulting from the TTIP could be considerable. Instead of manufacturing to conform to both EU and U.S. standards, their production would have to conform to only one standard to the extent they want to export to these markets.

And—recognizing the costs of conforming with both Euro-American standards and their own national standards, many companies in these countries will see it in their interest to press their own governments to accept the Euro-American standards. If they do so, our own companies would benefit greatly—because that would create a more level playing field in those emerging markets.

But this will not come automatically. The United States and the EU need to build on our shared economic interests and values in order to collectively demonstrate our support for them. This will give us a stronger platform to seek support for global acceptance of the key rules, norms and practices that have been so important in the success of the global economy we have today—one that has benefitted our own economy and many emerging economies as well.

We generally think of regional preferential trade agreements as having trade diversion effects, but this is not a very useful way of thinking about this one. Here the thrust will be a desire for deeper integration.

Tariffs between the U.S. and EU are already very low. The majority of the subjects the U.S. and EU agreement would cover go well beyond tariff commitments to address non-trade barriers, and other policy areas that may not be covered by existing WTO agreements. These include competition policy and investment—that are essential to the effective functioning of integrated supply chains.

It follows that the U.S.-EU agreement will result in little trade diversion. In fact, it can complement and reinforce the multilateral system, and contribute to the development of global

rules in areas where progress at the multilateral level has not been possible in the past. So down the road, the TTIP has the potential to create new international standards that could become the building blocks for future progress in the WTO.

* * * *

At the conclusion of the third round, United States Trade Representative Michael Froman issued the following statement, available at www.ustr.gov/about-us/press-office/press-releases/2013/December/Statement-by-Ambassador-Froman-on-Third-Round-TTIP-Negotiations:

As 2013 comes to a close, I'm pleased with the progress we've made in these early months of the T-TIP negotiations. In addition to the three rounds of negotiations we have conducted since we launched the negotiations in June, our teams have been engaging with each other between rounds, and working hard back home to prepare for productive meetings. It is a measure of progress that we are firmly in the phase of discussing proposals on core elements of each of the main negotiating areas, as well as beginning to confront and reconcile our differences on many important issues. We have a lot of work to do in 2014, but I am optimistic about what we'll be able to accomplish in the coming year. There is strong conviction on both sides that we have the opportunity in T-TIP to make our trade relationship a substantially stronger driver of transatlantic jobs, growth, and competitiveness.

The fourth round of negotiations was planned for the first quarter of 2014, with further engagement beforehand. For information on T-TIP, see www.ustr.gov/ttip.

c. U.S.-Colombia Trade Promotion Agreement

(1) Environmental Cooperation Agreement

On April 19, 2013, the United States and Colombia signed the U.S.-Colombia Environmental Cooperation Agreement ("ECA"). The ECA complements the Environment Chapter of the U.S.-Colombia Trade Promotion Agreement ("TPA") which was signed into law in the United States in 2011 and entered into force in 2012. See *Digest 2011* at 392-93 and *Digest 2012* at 392-93. As explained in a State Department media note, available at www.state.gov/r/pa/prs/ps/2013/04/207757.htm:

...the ECA will strengthen the ties between the United States and Colombia by creating new opportunities to work together to protect the environment and conserve natural resources. The ECA establishes a framework for environmental cooperation and will help ensure that trade and environmental policies are mutually supportive.

The ECA also provides for a new Environmental Cooperation Commission, a policy-level body that will oversee the implementation of the Agreement. The Commission will define a work program to establish specific goals, objectives, and areas for cooperation that are reflective of both countries' national environmental priorities.

(2) *Implementing regulations*

Effective October 31, 2013, the U.S. Customs and Border Protection regulations were amended to implement the preferential tariff treatment and other customs-related provisions of the United States-Colombia Trade Promotion Agreement. 78 Fed. Reg. 60,191 (Oct. 1, 2013).

d. ***Dominican Republic-Central America-United States Free Trade Agreement ("CAFTA-DR")***

In the first labor case brought by the United States under a trade agreement, the United States and Guatemala reached an agreement to suspend their dispute on April 11, 2013. In 2010, the United States had requested consultations with Guatemala under article 16.6.1 of the CAFTA-DR regarding apparent violations of Guatemala's obligations on labor rights. See *Digest 2010* at 492-94. After consultations in 2010 and a meeting of the CAFTA-DR Free Trade Commission in 2011 failed to resolve the dispute, the United States filed its request for arbitration on August 9, 2011. See *Digest 2011* at 384.

The suspension agreed in 2013 is intended to permit Guatemala to implement an 18-point Enforcement Plan negotiated by the parties. An April 30, 2013 USTR blog post summarizes the Enforcement Plan as follows:

It includes concrete actions with specific time frames that Guatemala will implement within six months to improve labor law enforcement. Under the Enforcement Plan, Guatemala has committed to strengthen labor inspections, expedite and streamline the process of sanctioning employers and ordering remediation of labor violations, increase labor law compliance by exporting companies, improve the monitoring and enforcement of labor court orders, publish labor law enforcement information, and establish mechanisms to ensure that workers are paid what they are owed when factories close.

More information about the dispute and terms of the agreement is available at www.ustr.gov/trade-topics/labor/bilateral-and-regional-trade-agreements/quatemala-submission-under-cafta-dr. USTR issued a fact sheet, excerpted below and available at www.ustr.gov/about-us/press-office/fact-sheets/2013/april/quatemala-labor-enforcement, in which it lists key actions contained in the Enforcement Plan.

* * * *

STRENGTHENING THE MINISTRY OF LABOR TO ENFORCE LABOR LAWS

Sanctioning Employers and Ordering Remediation: Guatemala will pursue legislation to establish an expedited process for labor courts to adopt fines recommended by the Ministry of Labor and Social Protection for labor law violations, and to order employers to remediate such violations. The legislation, when enacted, will reduce the time allowed for the Labor Ministry to transfer cases to the courts from six months to five days, and will require the courts to adopt and impose the Labor Ministry's fine recommendation, unless unreasonable.

Additional Resources for Inspections: Guatemala, on an ongoing basis, will provide the resources necessary for the Labor Ministry's effective enforcement of labor laws. In 2012, the Government of Guatemala provided additional resources to the Labor Ministry, including hiring 100 new inspectors and five additional attorneys, and acquiring 20 new vehicles for labor inspectors to conduct inspections throughout Guatemala.

Ensuring Access to Worksites for Labor Inspectors: Guatemala will issue an agreement between the Ministry of Labor and the Ministry of Interior ensuring police assistance to facilitate labor inspector access to worksites.

ENSURING PAYMENT TO WORKERS WHEN FACTORIES SUDDENLY CLOSE

Early Warning System: Guatemala will provide relevant agencies with direct access to each other's databases so that they may immediately share new information related to a company's operating status or indicators of impending company closure.

Rapid Response Team to Prevent Factory Closures: Guatemala has established a Rapid Response Team comprised of the Ministry of Economy, Ministry of Interior, the Tax Authority, the Social Security Institute, and the Judiciary to oversee export companies that receive special tax benefits. The Rapid Response Team will verify the imminent closure of a company and work with the employer to attempt to prevent closure and ensure payments owed to workers if the closure cannot be prevented.

Ensuring Workers Get Paid: Guatemala will issue a Ministerial Accord requiring the Labor Ministry to proactively intervene upon receiving information or indicators of a potential closure and take the necessary steps to obtain the payments owed to workers if that company closes, including by petitioning the relevant labor court to embargo or seize assets. This applies to all sectors.

IMPROVING ENFORCEMENT OF COURT ORDERS

Verifying Employer Compliance: Through the newly created "Verification Unit" within the Judiciary, Guatemala will verify timely compliance by employers with labor court orders. The Verification Unit will place particular emphasis on court orders to reinstate illegally fired workers.

Ensuring Criminal Prosecution for Employers who Fail to Comply: Guatemala will train labor court judges and other court personnel and develop the legal procedures necessary to help ensure effective criminal prosecution of employers who fail to comply with labor court orders related to the protection of workers' rights of association, right to organize, and right to bargain collectively.

Monitoring Enforcement of Labor Court Orders: Guatemala will conduct a systematic review of all labor courts and will apply disciplinary procedures to judges who fail to take measures required by law to enforce court orders.

ENSURING EXPORT COMPANIES COMPLY WITH LABOR LAWS

Monitoring Export Companies: The Labor Ministry will conduct annual inspections of all companies that receive tax and tariff benefits under special provisions of Guatemalan law (Decree 29-89) to confirm compliance with labor laws and reject new applications for benefits received from labor law violators.

Revoking Tax Benefits: Guatemala will issue a Government Accord requiring that the Ministry of Economy revoke tax and tariff benefits within five days of receiving notice from a labor court that an employer violated a labor law and failed to comply with the labor court's resolution.

Ensuring Worker Payments: With the help of an international institution, Guatemala will work to develop a contingency mechanism based on the extent of potential need to ensure payments owed to workers when Decree 29-89 companies close.

TRANSPARENCY AND COORDINATION

Stakeholder Input: Guatemala will publicize the Enforcement Plan and meet with the Tripartite Commission and other parties, as appropriate, to review its implementation.

Publication of Enforcement Statistics: Guatemala will publish data concerning labor complaints, inspections, violations, and court orders.

* * * *

2. Trade Legislation and Trade Preferences

a. Generalized System of Preferences

(1) Bangladesh

On June 27, 2013, President Obama issued a proclamation modifying duty-free treatment under the Generalized System of Preferences ("GSP") program for Bangladesh, as well as taking other actions related to trade preferences. 78 Fed. Reg. 39,949 (Jul. 2, 2013). Congress created the GSP program in the Trade Act of 1974, 19 U.S.C. 2461 et seq. ("the Act"), to help developing countries expand their economies by allowing certain goods to be imported into the United States duty free. The President determined that Bangladesh's designation as a GSP beneficiary developing country should be suspended in accordance with sections 502(b)(2)(G) and 502(d)(2) of the Act, "because it has not taken or is not taking steps to afford internationally recognized worker rights to workers in the country." The President took this step as part of an effort to address worker safety concerns in Bangladesh which became the subject of worldwide attention after two accidents in Bangladesh causing mass casualties: the November 2012 Tazreen Fashions factory fire and the April 2013 Rana Plaza building collapse.

A July 19, 2013 State Department media note elaborates on the efforts by the United States—in conjunction with the suspension of GSP benefits—to work with the

government of Bangladesh to ameliorate working conditions in the country. The media note, excerpted below, is available at www.state.gov/r/pa/prs/ps/2013/07/212209.htm.

* * * *

At the time of the announcement [regarding GSP], the Administration provided the Government of Bangladesh with an action plan which, if implemented, could provide a basis for the President to consider the reinstatement of GSP trade benefits.

Today, the Administration is making this action plan public as a means to reinforce and support the efforts of all international stakeholders to promote improved worker rights and worker safety in Bangladesh. On the basis of this action plan, the United States looks forward to continuing to work with Bangladesh on the actions it needs to take in relation to potential reinstatement of GSP benefits.

The United States is also pleased to associate itself with the July 8, 2013 European Union (EU)-Bangladesh-International Labor Organization (ILO) *Sustainability Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-made Garment and Knitwear Industry in Bangladesh* (Compact). The United States looks forward to working as a full partner with the EU, Bangladesh, and the ILO to implement the goals of the Compact, many of which are broadly consistent with the GSP action plan we are releasing today. At the same time, the United States will pursue additional concrete actions required under the GSP action plan, such as increasing sanctions for labor violations sufficient to deter future misconduct, publicly reporting on the outcome of union registration applications, establishing an effective complaint mechanism for labor violations, and ending violence and harassment of labor activists and unions.

In addition to these complementary, government-to-government efforts, the Administration recognizes the importance of efforts by retailers and brands to ensure that the factories from which they source are compliant with all fire and safety standards in Bangladesh. We urge the retailers and brands to take steps needed to help advance changes in the Bangladeshi garment sector and to work together and with other stakeholders to ensure that their efforts are coordinated and sustained.

The Administration looks forward to continuing its engagement with the Government of Bangladesh and all stakeholders in order to effect positive change for Bangladeshi workers and to help ensure that the recent tragedies we have witnessed do not recur.

BANGLADESH ACTION PLAN 2013

The United States Government encourages the Government of Bangladesh (GOB) to take significant actions to provide a basis for reinstating Bangladesh's Generalized System of Preferences (GSP) benefits, including by implementing commitments under the "National Tripartite Plan of Action on Fire Safety and Structural Integrity" and taking the following actions:

Government Inspections for Labor, Fire and Building Standards

- Develop, in consultation with the International Labor Organization (ILO), and implement in line with already agreed targets, a plan to increase the number of government labor, fire and building inspectors, improve their training, establish clear procedures for independent and credible inspections, and expand the resources at their disposal to conduct effective

inspections in the readymade garment (RMG), knitwear, and shrimp sectors, including within Export Processing Zones (EPZs).

- Increase fines and other sanctions, including loss of import and export licenses, applied for failure to comply with labor, fire, or building standards to levels sufficient to deter future violations.
- Develop, in consultation with the ILO, and implement in line with already agreed targets, a plan to assess the structural building and fire safety of all active RMG/knitwear factories and initiate remedial actions, close or relocate inadequate factories, where appropriate.
- Create a publicly accessible database/matrix of all RMG/knitwear factories as a platform for reporting labor, fire, and building inspections, including information on the factories and locations, violations identified, fines and sanctions administered, factories closed or relocated, violations remediated, and the names of the lead inspectors.
- Establish directly or in consultation with civil society an effective complaint mechanism, including a hotline, for workers to confidentially and anonymously report fire, building safety, and worker rights violations.

Ready Made Garments (RMG)/Knitwear Sector

- Enact and implement, in consultation with the ILO, labor law reforms to address key concerns related to freedom of association and collective bargaining.
- Continue to expeditiously register unions that present applications that meet administrative requirements, and ensure protection of unions and their members from anti-union discrimination and reprisal.
- Publicly report information on the status and final outcomes of individual union registration applications, including the time taken to process the applications and the basis for denial if relevant, and information on collective bargaining agreements concluded.
- Register non-governmental labor organizations that meet administrative requirements, including the Bangladesh Center for Worker Solidarity (BCWS) and Social Activities for the Environment (SAFE). Drop or expeditiously resolve pending criminal charges against labor activists to ensure workers and their supporters do not face harassment or intimidation. Advance a transparent investigation into the murder of Aminul Islam and report on the findings of this investigation.
- Publicly report on the database/matrix identified above on anti-union discrimination or other unfair labor practice complaints received and labor inspections completed, including information on factories and locations, status of investigations, violations identified, fines and sanctions levied, remediation of violations, and the names of the lead inspectors.
- Develop and implement mechanisms, including a training program for industrial police officers who oversee the RMG sector on workers' freedom of association and assembly, in coordination with the ILO, to prevent harassment, intimidation and violence against labor activists and unions.

Export Processing Zones

- Repeal or commit to a timeline for expeditiously bringing the EPZ law into conformity with international standards so that workers within EPZ factories enjoy the same freedom of association and collective bargaining rights as other workers in the country. Create a government-working group and begin the repeal or overhaul of the EPZ law, in coordination with the ILO.

- Issue regulations that, until the EPZ law has been repealed or overhauled, will ensure the protection of EPZ workers' freedom of association, including by prohibiting "blacklisting" and other forms of exclusion from the zones for labor activities.
- Issue regulations that, until the EPZ law is repealed or overhauled, will ensure transparency in the enforcement of the existing EPZ law and that require the same inspection standards and procedures as in the rest of the RMG sector.

Shrimp Processing Sector

- Actively support ILO and other worker-employer initiatives in the shrimp sector, such as the March 2013 Memorandum of Agreement, to ensure the strengthening of freedom of association, including addressing anti-union discrimination and unfair labor practices. Publicly report on anti-union discrimination or other unfair labor practice complaints received and labor inspections completed, including information on factories and locations, status of investigations, violations identified, fines and sanctions levied, remediation of violations, and the names of the lead inspectors.

* * * *

(2) *Annual review*

The decision to suspend GSP benefits for Bangladesh was one of several outcomes of the annual review of the GSP program, concluded in June 2013. See USTR press release, available at www.ustr.gov/about-us/press-office/press-releases/2013/june/gsp-review-outcome. Other outcomes include the determinations by President Obama: 1) to grant waivers of competitive need limitations ("CNLs") for over 100 products from 14 countries; and 2) that two products from two countries—a corn product from Brazil and passenger tires from Indonesia—should no longer be eligible for duty-free treatment under the GSP program because the relevant country is sufficiently competitive and exceeded CNLs for the product.

(3) *Lapse of GSP*

Legal authorization of the GSP program expired on July 31, 2013. The U.S. Congress considered extending the authorization of GSP but had not done so before the end of 2013. For more information, see USTR's GSP website, www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp.

b. *AGOA*

On December 23, 2013, President Obama issued a proclamation, designating Mali as a beneficiary sub-Saharan African country pursuant to the African Growth and Opportunity Act ("AGOA"). 78 Fed. Reg. 80,415 (Dec. 31, 2013). The President had terminated Mali's designation as a beneficiary sub-Saharan African country in 2012. See *Digest 2012* at 386. The determination to restore Mali's designation was based on actions Mali had taken over the past year.

3. Arbitration and Related Actions Arising from the Softwood Lumber Agreement

As discussed in *Digest 2012* at 386, the United States and Canada agreed to extend the 2006 Softwood Lumber Agreement Between the Government of the United States of America and the Government of Canada (“SLA”). However, a dispute arose between the parties as to whether Canada's obligation to collect the Compensatory Adjustments awarded by the Tribunal in London Court of Arbitration (“LCIA”) Arbitration No. 81010 should cease upon the expiration of the original agreement. On September 30, 2013, Canada and the United States submitted a joint request for arbitration in the LCIA, seeking to have the original tribunal in LCIA Arbitration No. 81010 resolve the parties’ dispute as to interpreting the Award. The joint request is available at www.ustr.gov/sites/default/files/Joint%20Request%20for%20Arbitration.pdf.*

E. INTELLECTUAL PROPERTY

1. Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled

On June 27, 2013 in Marrakesh, the United States along with other member states of the World Intellectual Property Organization (“WIPO”) formally adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The Marrakesh Treaty was the outcome of a WIPO Diplomatic Conference hosted by the Kingdom of Morocco. The full text of the Treaty is available at www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323. The Marrakesh Treaty obliges nations to establish copyright exceptions for people with print disabilities and aims to increase the international exchange of accessible-format copies of published works. The U.S. Patent and Trademark Office issued a press release on the adoption of the Treaty, available at www.uspto.gov/news/pr/2013/13-21.jsp, as did the U.S. Copyright Office, available at www.copyright.gov/newsnet/2013/510.html. The White House statement on the adoption of the Marrakesh Treaty is available at www.whitehouse.gov/blog/2013/06/28/landmark-treaty-visually-impaired. The U.S. closing statement at the diplomatic conference is available at <http://geneva.usmission.gov/2013/06/27/wipo-marrakesh/> and includes the following:

...We are proud to have participated in a Diplomatic Conference that has produced ... an international agreement to significantly improve access to printed works for persons with print disabilities while preserving the integrity of the international copyright system.

* Editor’s Note: On April 2, 2014, the tribunal issued its decision that the obligation to collect Compensatory Adjustments applied only until the expiration date of the SLA as it stood at the time of the original award (October 12, 2013). The award is available at www.international.gc.ca/controls-controles/assets/pdfs/softwood/lc-05.pdf.

...[W]e have always said that crafting an international instrument on copyright exceptions for persons with print disabilities is just one step on the road to ensuring that the blind and others with print disabilities have a chance to get the information and education they need and to live independently as full citizens in their communities.

...

But our efforts today are really just the beginning of a new chapter in the struggle of the blind. Not only will Member States have to ratify this treaty, but scores of countries need to join the approximately 60 Member States that have clear exceptions in their national copyright laws for the blind; additional authorized entities will have to be established and capacity built; confidence in cross-border exchange of accessible format copies will have to increase as the new international legal framework sets in.

The United States signed the Marrakesh Treaty in Geneva on October 2, 2013.

2. Special 301 Report

In May 2013, the Office of the U.S. Trade Representative (“USTR”) issued the 2013 Special 301 Report (“Report”) to identify those foreign countries that deny adequate and effective protection of intellectual property rights (“IPR”) or deny fair and equitable market access to U.S. persons that rely upon intellectual property protection. USTR submits the Report annually pursuant to § 182 of the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act (enacted in 1994). The 2013 Report designates Ukraine a Priority Foreign Country (“PFC”) under the Special 301 statute due to severe deterioration of enforcement in the areas of government use of pirated software and piracy over the Internet, as well as denial of fair and equitable market access through the authorization and operation of copyright collecting societies. The Report also conveys concerns about misappropriation of trade secrets in China, while recognizing incremental progress on a few of China’s many other significant IPR and market access challenges. In 2013, USTR added Barbados, Bulgaria, Paraguay, and Trinidad and Tobago to the Watch List due to specific problems identified in the Report. And USTR announced that although El Salvador and Spain are not listed in the Report, USTR will conduct out-of-cycle reviews to assess progress on IPR challenges identified in this year’s reviews of those countries. Canada moved off the Special 301 Priority Watch List to the Watch List in recognition of significant progress on copyright issues, while USTR continues to work with Canada to address several remaining IPR concerns. And Brunei Darussalam and Norway also were removed from the Special 301 Watch List. A total of ten countries—Algeria, Argentina, Chile, China, India, Indonesia, Pakistan, Russia, Thailand, and Venezuela—are on the Priority Watch List and 30 are on the Watch List. USTR will seek to engage intensively with these countries, as appropriate, during the coming year. See *Digest 2007* at 605–7 for additional background on the watch lists.

The full text of the Report is available at www.ustr.gov/about-us/press-office/reports-and-publications/2013/2013-special-301-report. For a list of the countries identified in the 2013 Report, see USTR's press release, available at www.ustr.gov/about-us/press-office/press-releases/2013/may/ustr-releases-annual-special-301-report.

3. U.S. Joins Patent Law Treaty as a Contracting Party

On September 18, 2013, U.S. Ambassador to the UN in Geneva Betty King deposited the U.S. instrument of ratification for the Patent Law Treaty ("PLT") with the Director General of the World Intellectual Property Organization ("WIPO"), Dr. Francis Gurry. On December 18, 2013, the United States became a Contracting Party, bringing the total number of Contracting Parties to the PLT to 36. "The Treaty will benefit not only U.S. patent applicants and patentees but those of all PLT Contracting Parties looking to protect their inventions, efficiently and cost-effectively," said Ambassador King. The announcement of the U.S. joining the PLT is available on the website of the U.S. Mission to Geneva at <http://geneva.usmission.gov/2013/09/18/patent-law-treaty-wipo/>. As explained in that announcement, "[t]he PLT harmonizes certain patent application procedures in order to reduce or eliminate formalities and the potential for loss of rights." President Obama signed the Patent Law Treaties Implementation Act of 2012 on December 18, 2012, and it took effect on December 18, 2013.

4. U.S. Supreme Court's decision in *Kirtsaeng v. John Wiley & Sons*

On March 19, 2013, the U.S. Supreme Court issued its decision in *Kirtsaeng v. John Wiley & Sons*, 133 S.Ct. 1351 (2013). Mr. Kirtsaeng, the petitioner, had resold in the United States copies of texts published abroad by respondent John Wiley & Sons, which had been purchased by his relatives in Thailand and sent to him while he studied in the United States. Wiley claimed copyright infringement based on the prohibition in Section 602(a)(1) of the Copyright Act on importation into the United States without the copyright owner's permission of works acquired outside of the United States. The district court and appeals court both agreed with Wiley. The United States filed an amicus brief in the Supreme Court in support of affirming the appeals court. The U.S. brief is available at www.state.gov/s/l/c8183.htm. The petitioner asserted that he was justified under the "first sale" doctrine, also codified in the Copyright Act in Section 109, which allows the owner of a copy "lawfully made under this title" to sell or otherwise dispose of that copy. Respondent argued, as did the U.S. amicus brief, that "under this title" restricts application of the first sale doctrine to copies made in the United States. A majority of the Supreme Court disagreed, reversing and remanding. The introduction to the majority opinion of the Supreme Court appears below.

* * * *

Section 106 of the Copyright Act grants “the owner of copyright under this title” certain “exclusive rights,” including the right “to distribute copies ... of the copyrighted work to the public by sale or other transfer of ownership.” 17 U.S.C. § 106(3). These rights are qualified, however, by the application of various limitations set forth in the next several sections of the Act, §§ 107 through 122. Those sections, typically entitled “Limitations on exclusive rights,” include, for example, the principle of “fair use” (§ 107), permission for limited library archival reproduction, (§ 108), and the doctrine at issue here, the “first sale” doctrine (§ 109).

Section 109(a) sets forth the “first sale” doctrine as follows:

“Notwithstanding the provisions of section 106(3) [the section that grants the owner exclusive distribution rights], the owner of a particular copy or phonorecord *lawfully made under this title* ... is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” (Emphasis added.)

Thus, even though § 106(3) forbids distribution of a copy of, say, the copyrighted novel Herzog without the copyright owner's permission, § 109(a) adds that, once a copy of Herzog has been lawfully sold (or its ownership otherwise lawfully transferred), the buyer of that *copy* and subsequent owners are free to dispose of it as they wish. In copyright jargon, the “first sale” has “exhausted” the copyright owner's § 106(3) exclusive distribution right.

What, however, if the copy of Herzog was printed abroad and then initially sold with the copyright owner's permission? Does the “first sale” doctrine still apply? Is the buyer, like the buyer of a domestically manufactured copy, free to bring the copy into the United States and dispose of it as he or she wishes?

To put the matter technically, an “importation” provision, § 602(a)(1), says that

“[i]mportation into the United States, without the authority of the owner of copyright under this title, of copies ... of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies ... *under section 106*....” 17 U.S.C. § 602(a)(1) (2006 ed., Supp. V) (emphasis added).

Thus § 602(a)(1) makes clear that importing a copy without permission violates the owner's exclusive distribution right. But in doing so, § 602(a)(1) refers explicitly to the § 106(3) exclusive distribution right. As we have just said, § 106 is by its terms “[s]ubject to” the various doctrines and principles contained in §§ 107 through 122, including § 109(a)'s “first sale” limitation. Do those same modifications apply—in particular, does the “first sale” modification apply—when considering whether § 602(a)(1) prohibits importing a copy?

In *Quality King Distributors, Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 145, 118 S.Ct. 1125, 140 L.Ed.2d 254 (1998), we held that § 602(a)(1)'s reference to § 106(3)'s exclusive distribution right incorporates the later subsections' limitations, including, in particular, the “first sale” doctrine of § 109. Thus, it might seem that, § 602(a)(1) notwithstanding, one who buys a copy abroad can freely import that copy into the United States and dispose of it, just as he could had he bought the copy in the United States.

But *Quality King* considered an instance in which the copy, though purchased abroad, was initially manufactured in the United States (and then sent abroad and sold). This case is like *Quality King* but for one important fact. The copies at issue here were manufactured abroad. That fact is important because § 109(a) says that the “first sale” doctrine applies to “a particular

copy or phonorecord *lawfully made under this title*.” And we must decide here whether the five words, “lawfully made under this title,” make a critical legal difference.

Putting section numbers to the side, we ask whether the “first sale” doctrine applies to protect a buyer or other lawful owner of a copy (of a copyrighted work) lawfully manufactured abroad. Can that buyer bring that copy into the United States (and sell it or give it away) without obtaining permission to do so from the copyright owner? Can, for example, someone who purchases, say at a used bookstore, a book printed abroad subsequently resell it without the copyright owner’s permission?

In our view, the answers to these questions are, yes. We hold that the “first sale” doctrine applies to copies of a copyrighted work lawfully made abroad.

* * * *

F. OTHER ISSUES

1. World Telecommunication/Information and Communication Technology Policy Forum

In May 2013, the United States sent a delegation to the World Telecommunication/Information and Communication Technology Policy Forum (“WTPF”) in Geneva, Switzerland. As summarized in a May 17, 2013 State Department media note, available at www.state.gov/r/pa/prs/ps/2013/05/209591.htm:

Discussions were conducted by the International Telecommunication Union and focused on adoption of Internet Protocol version 6 (IPv6), promoting Internet Exchange Points to advance Internet connectivity, and supporting the multi-stakeholder model of Internet governance.

The forum sought to adopt six consensus-based opinions on Internet issues, validating the multi-stakeholder process which brought together governments, the technical community, civil society, and academia. The six opinions form a common denominator for future discussions on Internet governance.

2. Issuance of Presidential Permit for New International Trade Crossing in Detroit

On April 12, 2013, the Department of State issued a Presidential Permit to the State of Michigan for the construction, connection, operation, and maintenance of a bridge linking Detroit, Michigan, and Windsor, Ontario. For discussion of litigation arising from the issuance of the permit, see Chapter 5.A. A State Department media note issued that day explains the basis for granting the permit:

Under Executive Order 11423, as amended, the Secretary of State may issue a Presidential permit for an international border crossing after finding that such a crossing will serve the national interest. After a thorough review of the

Presidential Permit application for the New International Trade Crossing (NITC) that the Department of State received on June 21, 2012, and taking into account the public and inter-agency comments received on the matter, the Department of State determined that the issuance of a Presidential Permit for the NITC would serve the national interest. The Presidential Permit will be published in the Federal Register in the near future.

Consistent with the bilateral Beyond the Border Initiative, this permit contributes to ensuring that our border infrastructure supports increased competitiveness, job creation, and broad-based prosperity in the United States and Canada. The NITC will help to meet future capacity requirements in a critical travel corridor, promote cross-border trade and commerce, and advance our vital bilateral relationship with Canada.

3. Committee on Foreign Investment in the United States

In 2012, as discussed in *Digest 2012* at 397-407, the Committee on Foreign Investment in the United States (“CFIUS”) found national security implications in an acquisition by Ralls Corporation, a Chinese-owned entity, of certain wind farm project companies located in Oregon, within or in the vicinity of restricted air space at a U.S. Navy weapons system facility. President Obama issued an order pursuant to § 721 of the Defense Production Act of 1950 (“DPA”), 50 U.S.C. App. § 2170, (as amended by the Foreign Investment and National Security Act of 2007 (“FINSIA”), Pub. L. No. 110-49, 121 Stat. 246, requiring Ralls Corporation and its owners to divest all interest in the wind farm project companies and their assets and remove all construction, improvements, and installations they had made on the sites. Ralls Corporation challenged the actions of CFIUS and the President in federal court in the District of Columbia. On February 22, 2013, the district court granted the government’s motion to dismiss all but one claim brought by Ralls. *Ralls Corp. v. Committee on Foreign Investment in the United States*, No. 12-1513 (D. D.C. 2013). Specifically, the court reasoned that the claim that the President acted *ultra vires* and the equal protection claim were both barred by the finality provision in the statute. The court also found that challenges to CFIUS actions that preceded the President’s order were barred as moot. However, the district court allowed the challenge on due process grounds to proceed. Part I of the opinion’s analysis, addressing challenges to the President’s order, is excerpted below (with footnotes and citations to the record omitted).

* * * *

A. The Court lacks jurisdiction to review Ralls’s *ultra vires* claim.

Count III alleges that certain provisions of the Presidential Order exceed the authority granted to the President under section 721. Ralls specifically challenges the provisions of the

Presidential Order that:

- require Ralls to remove all items from the relevant properties and prohibit any access to the properties except to remove items;
- prohibit Ralls from selling or transferring any items made by Sany to any third party for use at the properties;
- prohibit Ralls from selling the Project Companies or their assets to any third party until it removes all items from the properties and ensures that CFIUS does not object to the proposed buyer; and
- authorize CFIUS to implement measures it deems necessary and appropriate to verify that operations of the Project Companies are carried out in such a manner as to ensure protection of the national security interests of the United States, such as by requiring the Companies and Project Companies to allow government employees to access their premises to inspect and copy books, accounts, documents; inspect any equipment and technical data, including software; and
- interview officers, or agents of the Companies or Project Companies, anywhere within the United States.

* * * *

2) *The finality provision under section 721 bars the Court's review of Ralls's ultra vires claim.*

...And here, the defense contends that the finality provision in section 721 expressly bars all judicial review, including review of the *ultra vires* claim.

The finality provision states, “The actions of the President under paragraph (1) of subsection (d) of this section and the findings of the President under paragraph (4) of subsection (d) of this section shall not be subject to judicial review.” 50 U.S.C. app. § 2170(e). The government urges the Court to find the *ultra vires* claim barred from judicial review because “Congress recognized that it was legislating in an area where—even apart from an express statutory withdrawal of jurisdiction—Presidential exercises of discretion are not ordinarily subject to judicial review.” Ralls counters that the finality provision does not bar its *ultra vires* claim because the provision, by its express language, applies only to Presidential actions “under” the statute. Therefore, according to Ralls, the Court has jurisdiction to determine whether the actions of the President fell outside the statutory grant of authority. The Court’s task is, therefore, to determine whether the finality provision extends so broadly as to eliminate judicial consideration of that question in this case.

The D.C. Circuit has provided some guidance for approaching this type of question. First, courts generally apply a presumption of judicial review when interpreting the language of a finality provision. *Dart v. United States*, 848 F.2d 217, 222 (D.C. Cir. 1988); *Amgen v. Smith*, 357 F.3d 103, 111 (D.C. Cir. 2004). Under that presumption, a claim is only unreviewable if the government demonstrates “clear and convincing evidence” that Congress intended to restrict access to judicial review. *Dart*, 848 F.2d at 221–23, citing *Bowen v. Mich. Acad. Of Family Physicians*, 476 U.S. 667, 671 (1986).

Courts next look to the language, structure, and legislative history of the statute to construe a finality provision’s scope. *Amgen*, 357 F.3d at 112, citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 206 (1994). The D.C. Circuit has acknowledged that this analysis is “intertwined” with the merits determination. *Amgen*, 357 F.3d at 113. “If a no-review provision

shields particular types of [executive] action, a court may not inquire whether a challenged [executive] decision is arbitrary, capricious, or procedurally defective, but it must determine whether the challenged . . . action is of the sort shielded from review.” *Id.*

* * * *

...the finality clause in section 721 contains an inherent limitation: it only withdraws judicial review over the President’s actions taken “under paragraph (1) of subsection (d) of this section.” 50 U.S.C. app. § 2170(e). Paragraph (1) of subsection (d), in turn, authorizes the President, once he has made the requisite findings, to “take such action for such time as the President considers appropriate to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.” *Id.* § 2170(d)(1). On its face, this provision leaves open a category of Presidential actions—those which the President does not consider appropriate to suspend or prohibit a covered transaction, or for which the President has not found that the affected transaction will impair the national security of the United States—to potential judicial review.

But Ralls does not claim that the President failed to make the proper findings. Rather, it claims that in imposing restrictions on the sale of the projects or the disposition of the turbines, the President took actions that exceeded his statutory powers. The amended complaint alleges that no provision of section 721 “grants the President any powers beyond ‘suspend[ing] or prohibit[ing]’ a ‘covered transaction.’” And Ralls repeatedly asserts that the President’s actions exceeded his authority because they went beyond merely “suspending or prohibiting” the transaction. ...

So plaintiff’s entire *ultra vires* claim is premised upon the notion that the only thing the statute permits the President to do is to suspend or prohibit a transaction. But the statute doesn’t say that. Section 721(d)(1) does not limit the President’s authority to merely suspending or prohibiting a transaction; rather, it grants the President extremely broad authority to “*take such action for such time as the President considers appropriate* to suspend or prohibit” transactions. (emphasis added). In other words, the statute expressly authorizes the President to do what he deems necessary to accomplish or implement the prohibition—not merely to issue it. The use of the open-ended temporal phrase “for such time” reinforces this interpretation; if the President was permitted to do nothing more than make an up or down decision, he would not need an unlimited period of time.

It is important to note that in this case, Ralls did not seek CFIUS approval before it acquired the projects or began construction and installation of the turbines. Rather, CFIUS and the President were presented with a purchase that had already taken place and a project that was already under way. The Presidential Order declares the transaction that resulted in the acquisition to be prohibited and then states, “in order to effectuate this order,” Ralls is required to divest. Presidential Order § 2(b). The order then goes on to call for the removal of the Chinese turbines, to bar their use in the future, and to restrict the foreign nationals’ access to the premises, among other things. *Id.* §§ 2(c)–(f). Since deciding to impose these sorts of requirements falls well within the scope of “taking such action . . . as the President considers appropriate . . . to prohibit” a transaction—particularly given the fact that the transaction had already taken place—their imposition was a Presidential action under subsection (d)(1) of the statute, and those actions

have been declared to be unreviewable by Congress. Thus, in accordance with the instructions set out by the D.C. Circuit in *Amgen*, this Court finds that the challenged action “is of the sort shielded from review.” 357 F.3d at 113.

* * * *

In this case, the jurisdictional question can be decided based upon a review of the plain language of the statutory grant of authority and the finality provision. But the D.C. Circuit has indicated that courts should also look to the statute’s structure and legislative history as well. *Dart*, 848 F.2d at 226. And here, those inquiries reveal that Congress structured the process so that Presidential action would be a last resort, to be exercised only the face of an otherwise uncontrollable national security risk. The statute established a multi-agency committee charged with the responsibility of determining in the first instance whether a transaction poses a national security concern and provided it with the tools to address any such concerns before the President gets involved at all. For example, Congress granted CFIUS the authority to “negotiate, enter into or impose, and enforce any agreement or condition” in order to mitigate any threat to the national security that arises as a result of the covered transaction. 50 U.S.C. app. § 2170(l)(1). Only if CFIUS determines that the measure did not mitigate the threat does the President have an opportunity to act. *Id.* §§ 2170(b)(2)(B)(i)(I), (d)(2). Moreover, the President is only authorized to take action if he finds that there is no other way to protect the national security: he must make a finding that “provisions of law, other than [section 721] and the International Emergency Economic Powers Act, do not, in the judgment of the President, provide adequate and appropriate authority for the President to protect the national security in the matter before the President.” *Id.* § 2170(d)(4)(B). The legislative history reflects the fact that Congress anticipated that the President would only rarely be involved. *See* H.R. Rep. No. 110-24(I) (2007), *reprinted in* 2007 U.S.C.C.A.N. 102, 104, at 11 (using language such as: “Transactions that enter investigation may also be terminated before reaching the President,” and “Presidential decisions are also avoided in cases where . . .”). So when Congress went on to foreclose judicial review of Presidential actions it did so in the context of a statutory scheme that limited the occasions for Presidential action in the first place.

In addition, to protect against abuse of authority in the absence of judicial review, Congress established itself as the monitor of the actions of both CFIUS and the President. In 2007, Congress expressed concern about CFIUS’s “accountability to Congress and the public” given that the reviews and investigations “remain highly confidential.” S. Rep. No. 110-80, at 3 (2007). The resulting amendments to the statute “enhance[d] Congress’s ability to perform its necessary oversight of the CFIUS process.” *Id.* at 7. This takes the form of “a system of briefings and annual reporting to Congress,” and briefings to any member of Congress on request. *Id.* at 8–11; 50 U.S.C. app. § 2170(g), (m). Moreover, “[a]ny transaction that goes to the President must be reported to Congress.” H.R. Rep. No. 110-24(I), at 11; *see* 50 U.S.C. app. § 2170(b)(3).

Finally, the legislative history reflects that Congress recognized that the authority it was conferring upon the President was to be executed in an area where the President already has broad authority to act. [E]xclusive of any powers derived from the Exon-Florio amendment or related regulations or executive orders, the President ultimately reserves the right in any transaction and at any time to reverse a transaction for national security purposes. This authority derives both from the International Emergency Economic Powers Act and his inherent powers in the conduct of foreign affairs. H.R. Rep. No. 110-24(I), at 12. So a review of the structure of the

statute and its legislative history supports the Court's determination that the finality provision bars consideration of the particular *ultra vires* claim advanced in this case.

* * * *

Accordingly, the Court will dismiss Count III, Ralls's *ultra vires* claim against the President, for lack of jurisdiction.

B. The Court lacks jurisdiction to review Ralls's due process challenge to the Presidential Order, but not the equal protection challenge.

Counts IV and V raise constitutional challenges to the Presidential Order. Again, the government argues that the Court is barred from reviewing these claims by the finality provision. The Court agrees with respect to plaintiff's equal protection claim, but not with respect to the due process claim.

1. *Ralls's equal protection claim is barred by the finality provision.*

The equal protection challenge to the Presidential Order alleges that Ralls, its affiliates, and its executives have unfairly and unjustly been treated differently from others who are supposedly similarly situated. The government counters that review of this claim is barred by the finality provision in section 721. As noted above, the Court must begin with a presumption of judicial review, which requires a showing of "clear and convincing evidence of a contrary legislative intent." *Dart*, 848 F.2d at 221, quoting *Bowen*, 476 U.S. at 671. The Court finds that this showing has been satisfied. While Count V invokes the Constitution, at bottom it asks the Court to review the merits of the President's decision, and Congress has clearly embodied its views about that exercise in the finality provision.

Ralls does not allege discrimination against a suspect group. So, an analysis of the equal protection claim would require the Court to determine whether the alleged differential treatment is rationally related to a legitimate government purpose. *Heller v. Doe*, 509 U.S. 312, 320 (1993); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). This inquiry necessarily involves reviewing the particular factual record that was before the President when he issued the order and determining whether the actions he took were rational in light of that record. In other words, to adjudicate the equal protection claim, the Court would be required to review both the President's findings and his actions and to probe the reasons behind them. This is precisely the type of inquiry that Congress withdrew from the courts in the finality provision in section 721. 50 U.S.C. app. § 2170(e) (barring judicial review of "the *actions* of the President under paragraph (1) of subsection (d) of this section and the *findings* of the President under paragraph (4) of subsection (d) of this section") (emphasis added).

In addition, the same structural and historical factors that call for the application of the finality provision to the *ultra vires* claim provide convincing evidence of Congress's intent to withdraw judicial review over the equal protection claim.

Moreover, the same separation of powers concerns that support the dismissal of the *ultra vires* claim reinforce the need to dismiss the equal protection claim. In *El-Shifa*, the Court of Appeals distinguished claims challenging the wisdom of discretionary decisions from claims "presenting purely legal issues such as whether the government had legal authority to act." 607 F.3d at 842 (internal quotation marks omitted). Here, the equal protection claim is an as-applied challenge that essentially asks the Court to adjudicate the wisdom of the President's decision to prohibit the Terna-Ralls transaction. The question it presents is discretionary rather than purely legal because it requires an assessment of the rationality of the President's specific factual

determination on a matter of national security—a determination committed solely to the President’s discretion.

The fact that the challenge in this case is dressed in constitutional garb is inconsequential. In the political question context, the D.C. Circuit has found that judicial review of claims that present political questions is barred, “regardless of how they are styled, [so long as they] call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.” *El-Shifa*, 607 F.3d at 842.

It is true, as plaintiff points out, that there are cases in which the courts called for a higher burden of proof to show that a finality clause stripped them of jurisdiction over constitutional claims. In those cases, the courts sought to avoid an interpretation of the finality provision that would raise serious constitutional questions about Congress’s power to prevent adjudication of the constitutionality of a statute. *See, e.g., Webster v. Doe*, 486 U.S. 592 (1988); *Bowen*, 476 U.S. at 667; *Johnson v. Robison*, 415 U.S. 361, 364–74 (1974); *Lepre v. Dep’t of Labor*, 275 F.3d 59 (D.C. Cir. 2001). But the doctrine of constitutional avoidance is not implicated in this instance because the equal protection claim does not question the constitutionality of the statute—it simply questions the fairness of the President’s decision. Thus, the Court’s application of the finality provision to dismiss Count V does not raise any serious constitutional questions about Congress’s power to remove jurisdiction from the courts. ...

Ralls cites *Ralpho v. Bell*, 569 F.2d 607 (D.C. Cir. 1977), and *Ungar v. Smith*, 667 F.2d 188 (D.C. Cir. 1981), for the proposition that this Circuit requires clear and convincing evidence of Congress’s intent to preclude judicial review of any constitutional claims, even as-applied claims. But the cases do not go so far, and they do not require this Court to permit the equal protection claim to proceed. Both *Ralpho* and *Ungar* posed constitutional challenges to an administrative agency’s implementation of a statute; they did not challenge particular actions of the President in the national security realm, where exercises of discretion are generally unreviewable. And in both cases, the plaintiffs were complaining about the process they had been afforded rather than the substance of the decisions that were rendered.

* * * *

But in support of its motion to dismiss Count V, the government is not arguing for such a broad “general proscription” of judicial review. It simply contends that the Court need not apply the doctrine of constitutional avoidance because: 1) the finality provision in section 721 bars judicial review of the President’s discretionary actions and his reasons for taking such actions in an individual case; and 2) that is the only sort of review plaintiff is seeking here. While Ralls styles the claim as arising under the Constitution, plaintiff’s fundamental grievance—that other foreign owned windfarms have been treated differently than this windfarm—falls squarely under the plain language of the finality provision. Since the Court has found clear and convincing evidence that Congress intended to withdraw jurisdiction over the equal protection claim, it will dismiss Count V for lack of jurisdiction.

2. *The Court is not barred from reviewing Ralls’s due process challenge to the Presidential Order.*

But in light of these precedents, the Court cannot find that there is clear and convincing evidence to show that Congress intended to divest the courts of their ability to hear the due process challenge to the executive action in this case. Ralls alleges that the Presidential Order deprived it of its property without due process of law. According to the amended complaint, the

Due Process Clause of the Fifth Amendment entitles Ralls to an opportunity to be heard and to the reasons for the President's decision. So, Ralls is asking the Court to determine what procedural protections were due, and whether it was denied those protections.

At the motions hearing in this case, the government argued that through the due process claim, Ralls is actually seeking a more detailed explanation of the President's findings so that Ralls can "attack and undermine" them. This, the government claimed, amounts to a demand for judicial review of the President's findings, which is expressly barred by the finality provision. It is true that the finality provision will bar the Court from hearing any attack on the President's findings. But there is a difference between asking a court to decide whether one was entitled to know what the President's reasons were and asking a court to assess the sufficiency of those reasons. And the fact that plaintiff may not be able to use the information in a certain way does not answer the question of whether it is entitled to have it. It may be that the Court will ultimately decide that in the context of a national security decision committed to the President's discretion, the opportunities provided to the plaintiff here comported with due process, or the plaintiff is not entitled to the reasons. Since the matter has not yet been fully briefed, the Court expresses no opinion on those issues. The sole question before the Court at this stage is whether the statute clearly bars any consideration of plaintiff's procedural concerns, and the Court finds that it does not.

In addition, judicial review of the due process claim presented here does not present the same separation of powers concerns that would be raised by consideration of the equal protection claim. Count IV raises a pure legal question that can be answered without second-guessing the President's determinations. *See El-Shifa*, 607 F.3d at 842 (finding that claims "[p]resenting purely legal issues such as whether the government had legal authority to act" do not pose the same separation of powers problems as claims seeking review of discretionary determinations made by the executive branch) (alteration in original) (internal quotation marks omitted). Since the Court finds no clear and convincing evidence that Congress intended to withdraw jurisdiction over the due process challenge to the Presidential Order, it will proceed to hear that claim on the merits, and the motion to dismiss Count IV for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) will be denied. The order accompanying this opinion will address the schedule for the filing of additional submissions.

* * * *

After the district court dismissed all but the due process claim in the case, the United States filed a second motion to dismiss that remaining claim on March 21, 2013. Excerpts follow from the U.S. brief in support of its motion to dismiss. The brief is available in full at www.state.gov/s/l/c8183.htm. The United States also filed a reply brief in support of its motion to dismiss (not excerpted herein), available at www.state.gov/s/l/c8183.htm.

* * * *

Ralls contends that the Due Process Clause of the Fifth Amendment obligates the President

to disclose the information that he relied upon in determining that its acquisition of the Project Companies threatens to impair the national security of the United States, and to explain the reasoning that he used to determine that this threat to the national security warranted an order requiring Ralls to divest itself of the Project Companies. In order to state a claim for a violation of due process, a party must show both that it has been deprived of a protected interest, such as a property interest, and that the government did not afford it Constitutionally sufficient procedures. *See, e.g., Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). Ralls can make neither showing.

I. Ralls Does Not Hold a Constitutionally Cognizable Property Interest in the Project Companies, Because It Was on Notice that Its Acquisition of the Project Companies Was Subject to Suspension or Prohibition by the President

Ralls contends that it “possesses numerous valid property interests and property rights by virtue of its acquisition of the Project Companies, including but not limited to the Project Companies themselves,” as well as easements and other contracts held by the Project Companies. (Am. Compl., ¶ 146.) It accordingly contends that the Presidential Order deprived it of these property interests by requiring it to divest the Project Companies and by imposing the conditions that the President determined necessary to effectuate the divestiture order. (Am. Compl., ¶ 148.) This claim misapprehends the nature of Ralls’s interests. In acquiring the Project Companies, Ralls chose to forgo the process contemplated under the Defense Production Act, which anticipates that a foreign acquirer will first seek a review from CFIUS, and possibly the President, before proceeding with a transaction that could raise national security considerations. Because Ralls chose not to undergo this review before completing its transaction, it ran the risk that the President would later exercise his power to disapprove the transaction and require Ralls to divest its interests. Consequently, Ralls had nothing more than a unilateral expectation that it would be able to avoid a Presidential review, and that unilateral expectation (premised on the hope that its transaction would go unnoticed) cannot give rise to a due process claim.

If a foreign acquirer does not voluntarily file with CFIUS, any CFIUS member or his designee may file an “agency” notice with CFIUS and thereby initiate a CFIUS review process, *even if the transaction has already been completed*. 50 U.S.C. App. § 2170(b)(1)(D); 31 C.F.R. § 800.401(c). A party that does not initiate a review of its transaction remains subject, indefinitely, to the possibility of Presidential action. 31 C.F.R. § 800.601. And if the President’s review then results in his order suspending or prohibiting the transaction, the parties would then bear the consequences of their choice to proceed before seeking review through the CFIUS process. *See* 50 U.S.C. App. § 2170(d)(3) (authorizing divestment relief). Thus, although the Defense Production Act does not directly require foreign acquirers to file voluntary notices,

there are very, very strong incentives for those companies for which acquisitions could potentially affect national security to file. The potential negative ramifications of not filing are very, very severe. There is no statute of limitations, the transaction can be unwound at any time. There are very strong incentives and I think the voluntary filing system works

H.R. 5337, the Reform of National Security Reviews of Foreign Direct Investments Act: Hrg. Before the Subcomm. On Domestic & International Monetary Policy, Trade, & Technology, H. Comm. on Fin. Servs., 109th Cong. 31 (2005) (testimony of David Marchick, attorney, Covington& Burling).

As a Treasury official has explained the process, parties to covered transactions that raise national security considerations would be wise to file a notice voluntarily with CFIUS:

[H]aving sat on boards of directors both at home and abroad, I cannot imagine in the post-Sarbanes-Oxley world . . . how any director could give the go-ahead on a transaction [that had not been filed], because the President's authority to unwind that transaction is without limit if the person has not received approval of the process. . . . [T]hat very powerful nonjudicially reviewable authority of the President to stop or unwind transactions acts as a real leavener on the process[.]

A Review of the CFIUS Process of Implementing the Exon-Florio Amendment: Hrgs. Before the S. Comm. on Banking, Housing, and Urban Affairs, 109th Cong. 114 (2005) (testimony of Robert M. Kimmitt, Deputy Secretary, U.S. Dep't of Treasury). In other words, "[t]here is no right to buy. You do not have to file, but by not filing, you do not immunize yourself from a finding that the transaction could be canceled on security grounds." *Committee on Foreign Investment in the United States (CFIUS), One Year After Dubai Ports World: Hearing before H. Comm. on Fin. Servs.*, 110th Cong. 26 (2007) (statement of Rep. Barney Frank, Chairman, H. Comm. on Fin. Servs.).

Ralls, nonetheless, elected to proceed with its acquisition of companies organized to develop wind farms in the vicinity of a military installation, without first seeking a review of the transaction by CFIUS. In order to hold a property interest, a person "must have more than a unilateral expectation of" a benefit; "[h]e must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Ralls, like any other foreign acquirer of a United States entity in a transaction that could raise national security considerations, had no legitimate claim of entitlement to retain its acquisition without a determination by CFIUS or the President that the transaction did not pose a threat to national security. After all, "[n]o one can be said to have a vested right to carry on foreign commerce with the United States." *Ganadera Indus., S.A. v. Block*, 727 F.2d 1156, 1160 (D.C. Cir. 1984) (quoting *The Abby Dodge*, 223 U.S. 166, 176 (1912)). Because Ralls was on notice that its transaction could be unwound at any time, it held no Constitutionally cognizable property interest in the results of that transaction.

Because Ralls chose not to avail itself of the CFIUS process, any interests that it gained in the Project Companies were "'revocable,' 'contingent,' and 'in every sense subordinate to the President's power under the [Defense Production Act]," *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981). Ralls thus gained no property interests protectable by the Due Process Clause in those companies. . . .

* * * *

II. The Broad Discretion Afforded to the President under the Act Further Undercuts Any Property Interest Claimed by Ralls

Ralls lacks any Constitutionally cognizable property interest in the Project Companies for an additional reason. The Defense Production Act commits the decision whether to suspend or prohibit a foreign acquisition of a United States business entirely to the discretion of the President.

Ralls does not hold a property interest in any particular outcome from the President's deliberations as to how to exercise his discretion under the Act.

* * * *

It necessarily follows from the breadth of the President's discretion under the Defense Production Act that a foreign acquirer does not have any protected interest in how the President exercises that discretion. "[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion." *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). A protected interest could arise if a statute "establish[es] substantive predicates to govern official decision-making and, further, . . . mandat[es] the outcome to be reached upon a finding that the relevant criteria have been met." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. at 462 (internal citation omitted). But where a statute does not do so, then no due process rights accrue from the government's exercise of its discretion under that statute. See *Menkes v. Dep't of Homeland Security*, 637 F.3d 319, 338 (D.C. Cir. 2011); *Roth v. King*, 449 F.3d 1272, 1285 (D.C. Cir. 2006); see also *Omar v. McHugh*, 646 F.3d 13, 22 n.7 (D.C. Cir. 2011).

* * * *

III. Ralls Was Not Entitled to Receive the Evidence upon which the President Relied in Reaching the Decision Committed to His Discretion

Even assuming that the Presidential Order deprived Ralls of a property interest, and even assuming that Ralls has any procedural rights relating to a decision committed to the President's discretion, its claim still fails. Ralls asserts that, as a matter of due process, the President was required to disclose the evidence upon which he relied in finding that its acquisition of the Project Companies "threatens to impair the national security of the United States," 50 U.S.C. App. § 2170(d)(1). Ralls had no right to such participation in the President's decision-making.

In a case (unlike this one) where due process rights are implicated, the determination of what process is "due" requires a review of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Under this analysis, the Due Process Clause requires only that process which is due under the circumstances of the case. "[I]t is by now well established that 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) (internal quotations omitted)). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In this particular situation where Congress has committed a decision implicating national security to the

President's discretion, Ralls was not entitled to demand to participate directly in the President's decision-making.

A. The Government Has a Strong Interest Weighing against the Disclosure of Sensitive National Security Evidence to the Subject of a Presidential Order under the Defense Production Act

"[N]o governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981). It is obvious that the Defense Production Act supports a governmental interest of the highest order. The President is charged with protecting the national security of the United States, and as part of that duty he has the authority to review whether the foreign acquisition of a United States business will threaten to impair the national security. The Defense Production Act is structured so that "interventions by the President would be extraordinary," H.R. Rep. No. 110-24, pt. 1, at 12 (2007); as this Court has recognized, "Congress structured the process so that Presidential action would be a last resort, to be exercised only [in] the face of an otherwise uncontrollable national security risk." (ECF 48 at 26.) In the rare cases where the President exercises this extraordinary authority, it is clear that he requires the ability to keep sensitive national security information confidential from the foreign acquirer. *See* 50 U.S.C. App. § 2170(b)(4) (requiring Director of National Intelligence to prepare analysis of threat to national security posed by covered transactions). Indeed, the foreign acquirer is the very focus of the President's finding of credible evidence of a threat to the national security. *See* 50 U.S.C. App. § 2170(d)(4)(A) (directing the President to find whether "there is credible evidence that leads the President to believe that the *foreign interest exercising control* might take action that threatens to impair the national security"). It would therefore be intolerable if foreign acquirers could gain access to the confidential national security bases for the President's determinations on this score. *See Waterman*, 333 U.S. at 111; *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (due process does not prevent decision based on classified information to which party did not have access); *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1242-43 (D.C. Cir. 2003) (same).

* * * *

B. Ralls's Private Interest Is Insubstantial Relative to the Government's Interests

In comparison to these compelling governmental interests, Ralls's interests are minimal. At noted, Ralls was on notice that, by proceeding with its acquisition without first submitting a notice to CFIUS, it ran the risk of a Presidential prohibition of the transaction at any time. For the reasons described above, Ralls therefore lacked any protected property interest in its acquisition. But even if Ralls could clear that threshold for a due process claim, it is apparent that any interest that it held in maintaining its transaction free from the President's oversight pales in comparison to the government's interests here.

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C. Ralls's Intrusion into the Presidential Decision-Making Process Would Add No Value to the President's Deliberations

Finally, no value would be added to the President's decision-making if he were required to disclose his evidence or his deliberations to Ralls. Again, as noted, the President may consider

any factor that he deems appropriate in making his finding that a foreign acquisition threatens to impair the national security. Indeed, the President is not obligated to accept a recommendation from CFIUS, *see* 50 U.S.C. App. § 2170(d)(2) (reserving power to the President to decide whether or not to take action), and nothing in the statute limits the sources of information that the President may draw upon in assessing threats to the national security. Congress has specified the process that it deemed warranted, and a federal court should not specify additional procedures for the President to follow. ...

* * * *

In light of the foregoing, due process did not require the President to engage Ralls in his decision-making. It is notable that Ralls did, once prompted, submit a notice to CFIUS in which it availed itself of the invitation extended to all filers under CFIUS's regulations to state its views as to why national security was not implicated by its transaction. (ECF 7-7 at 5-6.) It is also notable that Ralls requested and received the opportunity to meet and discuss the matter with CFIUS several times to discuss the matter. (*See supra*, pp. 4-7.) The question at hand, however, is Ralls's claim that the President was required to afford it particular procedures before arriving at the decision committed to his discretion. There is no basis to conclude that the President's exercise of his discretionary authority should be cabined by mandating that he directly engage Ralls in his decision-making process.

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On October 9, 2013, the district court issued its opinion, granting the U.S. motion to dismiss the due process claim, and thereby, the case in its entirety. The court's opinion is excerpted below (with footnotes omitted). On October 16, 2013, Ralls filed a notice of appeal.

* * * *

I. Ralls has not alleged a protected interest.

The threshold requirement in a due process claim is that plaintiff must plead "that the government has interfered with a cognizable liberty or property interest." *Hettinga v. United States*, 677 F.3d 471, 479–80 (D.C. Cir. 2012) (per curiam); *see also Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Fifth Amendment's] protection of liberty and property."). While the underlying substantive interest may derive from an independent source such as state law, one looks to federal constitutional law to determine "whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978), quoting *Perry v. Sindermann*, 408 U.S. 593, 602 (1972).

Count IV of the amended complaint asserts that Ralls possesses property interests and property rights that it obtained by virtue of its acquisition of the Project Companies, including, but not limited to:

the Project Companies themselves; easements with local landowners to access their property and construct windfarm turbines; power purchase agreements with the local utility, PacifiCorp; generator interconnection agreements permitting connection to PacifiCorp's grid; transmission interconnection agreements and agreements for the management and use of shared facilities with other nearby windfarms; and necessary government permits and approvals to construct windfarm turbines at particular locations.

Am. Compl. ¶ 146. Plaintiff goes on to allege under the same count that the President's Order has "eviscerated these property rights," without due process. Am. Compl. ¶¶ 148–150.

* * * *

But Ralls undertook the transaction and voluntarily acquired those state property rights subject to the known risk of a Presidential veto. And Ralls's claim cannot be squared with the fact that Ralls waived the opportunity—provided by the very statute that it claims lacks the necessary process—to obtain a determination from CFIUS and the President before it entered into the transaction.

* * * *

Despite the availability of this pre-acquisition review, Ralls did not choose to submit written notice of its transaction to CFIUS before embarking on the transaction. That pre-acquisition review would have enabled Ralls to obtain, before it acquired the Project Companies and any corresponding property rights under state law, either a determination that the transaction threatened the national security of the United States and would be prohibited, or a determination that no threat existed, coupled with the assurance that CFIUS and the President could not prohibit the transaction later. So under those circumstances, it is inappropriate to apply the same due process analysis that would have applied if Ralls had acquired the Project Companies without this opportunity for pre-acquisition review. Because Ralls had the ability to obtain a determination about whether the transaction would have been prohibited before it acquired the property rights allegedly at stake, but it chose not to avail itself of that opportunity, Ralls cannot predicate a due process claim now on the state law rights it acquired when it went ahead and assumed that risk. *Parker v. Bd. of Regents of Tulsa Junior College*, 981 F.2d 1159, 1163 (10th Cir. 1992) (finding that the defendant had not violated the plaintiff's due process rights because plaintiff chose not to avail herself of the available due process procedures embodied in the termination proceedings); *cf. Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000) ("If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants.").

* * * *

In addition, Ralls's argument that it had an expectation interest in acquiring the property fails because the President's determination about whether to prohibit the transaction is entirely discretionary. Section 721 vests broad, unreviewable authority in the President to prohibit a transaction. The statute as a whole puts foreign-owned companies on notice that they do not have an entitlement to engage in mergers, acquisitions, or takeovers in the United States: they are subject to Presidential review.

* * * *

II. Ralls received sufficient process.

Even if the Court were to find that the President's Order deprived Ralls of some protected interest, based on either the state law property rights or the *Roth* theory, plaintiff's due process claim fails because Ralls received sufficient process.

All that is required before the deprivation of a protected interest is "notice and opportunity for hearing *appropriate to the nature of the case*." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (emphasis added). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The process that is due is determined by balancing three criteria: (1) the private interest affected by the governmental action; (2) the risk of an erroneous deprivation of such interest and the probable value of additional procedural safeguards; and (3) the government's interest in the existing procedure. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The balance of these factors shows that plaintiff was provided the process that was due.

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In light of the process that Ralls already received, and the limited nature of the additional process that Ralls seeks, the *Mathews* factors in this case weigh overwhelmingly in favor of the government. Even if the Court were to find that Ralls was deprived of some kind of property interest, that property interest is relatively weak in the face of the strong governmental interest in protecting the national security. See *Haig v. Agee*, 453 U.S. 280, 307 (1981) ("[N]o governmental interest is more compelling than the security of the Nation."). And while Ralls argues that the national security interest is speculative, the Court emphasizes that the only additional process Ralls is seeking here is to be informed of the grounds for the President's finding that, in his belief, Ralls might take action that threatens national security through exercising control over the Project Companies.

In this case, involving the application of this particular statutory scheme, the President has a valid interest, grounded in the national security of the United States, to withhold the particular evidence that gave rise to his concern about a national security threat from the entity that he believes might pose the threat. And that conclusion is bolstered by the fact that Congress specified that the President's determination would not be subject to review. See *People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17, 21 (D.C. Cir. 1999) (finding that the Secretary of State's finding that "the terrorist activity of [an] organization threatens the security of United States nationals or the national security of the United States" is not reviewable).

Ralls cites *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), but that case involved weighing the governmental interest against an individual's liberty interest in freedom from bodily detention. See *Hamdi*, 542 U.S. at 529–30 (describing the interest in "being free from physical detention from one's own government" as "the most elemental of liberty interests" and is "at the core of the liberty protected by the Due Process Clause"). The property interests allegedly at stake here are much less compelling. This is also why counsel's attempt to equate the Ralls meeting with CFIUS to the situation of a hypothetical criminal defendant facing a trial without any notice of

the charges against him, see Tr. at 39:22–25, is not an apt comparison. A criminal defendant risks deprivation of the strongest possible private interest—his liberty interest in freedom from detention—and the government interest being advanced during a criminal proceeding is not as strong as the interest advanced in section 721. This Court is bound to follow the decisions of the D.C. Circuit, and in the same line of cases that Ralls relies upon in its pleadings, that court has specifically rejected the notion that the level of due process required in a criminal trial should be the model for the national security context. See *Nat’l Council of Resistance of Iran v. Dep’t of State* (“NCRI I”), 251 F.3d 192, 209 (D.C. Cir. 2001); and *Nat’l Council of Resistance of Iran v. Dep’t of State* (“NCRI II”), 373 F.3d 152, 159–60 (D.C. Cir. 2004).

Moreover, the probable added value of providing Ralls with the reasons for the President’s proposed determination would be minimal in this case. Ralls was afforded an opportunity to present all of the reasons why it believed its involvement in the Project Companies did not pose a threat to the national security at a meeting with representatives from CFIUS. And, the statute expressly bars the courts from reviewing the actions and the findings of the President, which can be based on any factor that he deems appropriate. So even if Ralls had an opportunity to respond to the President’s specific concerns, the President still retained full discretion to make his decision based on any evidence that he considered credible, whether or not a neutral third-party would be persuaded by Ralls’s rebuttal.

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In the end, Ralls’s claim that it was denied due process on these grounds is predicated almost entirely on the line of cases involving the designation of organizations as “foreign terrorist organizations” under the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 8 U.S.C. § 1189 (2012). But a close reading of those cases does not support Ralls’s contention that due process necessarily requires the executive to disclose the reasons for his decision.

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4. Voluntary Principles on Security and Human Rights

On March 13 and 14, 2013, the United States participated in the annual plenary meeting of the Voluntary Principles on Security and Human Rights Initiative in The Hague. On the opening day of the plenary, the United States released its first public report on U.S. efforts to implement the Voluntary Principles, available at www.state.gov/j/drl/rls/vprpt/2012/206029.htm. The State Department explained the outcome of the meeting in a March 20, 2013 media note, available at www.state.gov/r/pa/prs/ps/2013/03/206458.htm:

As a result of the meeting last week, participants will move ahead with an impact study that will explore how the Voluntary Principles make a difference on the ground. Fourteen of the 22 participating companies also led a conversation on

the status of their pilot project on developing and integrating a set of key performance indicators into their systems. These indicators guide and assist in validating the ways that companies fulfill the commitments they make under the Voluntary Principles, to maintain high standards while they do business in difficult parts of the world. At the end of the meeting, Participants welcomed the Swiss chairmanship of the Initiative for the upcoming year.

The Voluntary Principles Initiative began in 2000 when governments, multinational corporations, and non-governmental organizations endorsed principles to guide private companies in the extractive industries in an effort to make sure that when companies extract resources in difficult places, they take tangible steps to minimize the risk of human rights abuses in the surrounding communities. See *Digest 2000* at 364-68. As of the 2013 plenary, the Voluntary Principles Initiative included 22 oil, mining, and gas companies; eight governments; and 13 non-governmental organizations. In 2012, the participants approved the creation of an association under Dutch law to be based in The Hague to administer the initiative. See *Digest 2012* at 409-10.

5. SEC Rules Implementing Dodd-Frank

As discussed in *Digest 2012* at 410-12, the U.S. Securities and Exchange Commission (“SEC”) adopted two final rules in 2012 that were mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”). Rule 13p-1, adopted to implement Section 1502 of Dodd-Frank, requires certain public companies to publicly disclose their use of conflict minerals that originated in the Democratic Republic of the Congo (“DRC”) or an adjoining country. Rule 13q-1, adopted to implement Section 1504 of Dodd-Frank, the “Cardin-Lugar amendment,” requires companies engaged in the commercial development of oil, natural gas, or minerals to disclose payments made to governments for the commercial development of resources. In 2013, the United States government defended these rules in multiple legal challenges brought in U.S. courts.

a. Challenge to Rule 13p-1 implementing Section 1502

In *National Association of Manufacturers et al v. SEC*, No. 13-5252 (D.C. Cir. 2013), plaintiffs-appellants challenged the rule implementing Section 1502 under the Administrative Procedure Act (“APA”), the Exchange Act, and the First Amendment of the U.S. Constitution. The district court rejected all plaintiffs’ challenges to the rule. On appeal, the SEC brief filed on October 23, 2013 argues that the SEC acted reasonably in arriving at the regulatory approach it used to implement Section 1502 and that the rule does not violate the First Amendment. The section of the brief summarizing the argument appears below. The full text of the brief is available at www.state.gov/s/l/c8183.htm.

* * * *

Appellants' disagreement with Congress's determination that Section 1502 will ameliorate the humanitarian crisis in the DRC animates their challenges to Rule 13p-1. But such a disagreement does not provide a basis for the Commission to undermine the scheme Congress envisioned. And the Commission reasonably determined that appellants' preferred regulatory approaches would do just that.

Far from thinking itself precluded from adopting the *de minimis* exception appellants advocated, the Commission requested comment on such an exception and analyzed whether it would be appropriate in light of Section 1502's purposes. After examining the language and structure of the statute, as well as evidence before it, the Commission reasonably concluded that creating a categorical exception for small uses of conflict minerals would thwart, rather than advance, those purposes. Indeed, it is undisputed that conflict minerals are frequently used in small amounts. And those small individual uses can have large cumulative effects.

Similarly, the Commission reasonably concluded that Congress included products "contracted to be manufactured" in the reporting requirement to prevent manufacturers from evading that requirement. And issuers would be able to do just that if those who contract to manufacture products were not included in the rule. Recognizing that the statute is silent as to how issuers determine whether their necessary conflict minerals originated in the Covered Countries, the Commission reasonably interpreted Section 1502 to require issuers to conduct due diligence when they encounter red flags in their reasonable country of origin inquiry. Without such a requirement, issuers would have an incentive to avoid learning the source of their minerals, thus undermining one of the fundamental requirements of Section 1502.

And the Commission's provision of a longer transition period for smaller issuers than for larger issuers was far from arbitrary. That larger issuers will have greater leverage over their suppliers, and should therefore be better equipped to determine whether their products are DRC conflict free more quickly, is both intuitive and supported by comment. And because some smaller suppliers in larger issuers' supply chains may not even be covered by the rule, and those that are will still be required to trace their minerals, there is no reason this accommodation for smaller issuers imposes an unreasonable burden on others.

In conducting its economic analysis, the Commission reasonably chose not to re-evaluate Congress's determination of benefits. Rather, the Commission designed Rule 13p-1 "to help achieve the intended humanitarian benefits in the way that Congress directed" (Adopting Release, JA0781/2), measuring the effects of its choices on issuers and users of the required disclosures. Nor was a re-evaluation of benefits in the DRC required for the Commission to reasonably conclude that the rule does not impose burdens on competition not necessary or appropriate in the furtherance of the Exchange Act. The Commission took numerous steps to lessen the burdens imposed by the rule. And where it did not do so, it reasonably concluded that the suggested alternatives would undermine the scheme Congress envisioned. In this circumstance, no more was required.

The Commission also provided an extensive qualitative analysis of the costs and benefits of its discretionary choices and a thorough quantitative analysis of the costs of the final rule. In the context of a mandatory rule where quantitative data was not available, this analysis was sufficient.

Finally, Section 1502 and Rule 13p-1 do not violate the First Amendment because they compel disclosure of factual information.

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b. Challenge to Rule 13q-1 implementing Section 1504

On July 2, 2013, a district court judge vacated Rule 13q-1 implementing Section 1504 of Dodd-Frank, finding that the SEC’s interpretation of the statute as requiring *public* disclosure of payments to governments was unreasonable under the APA. *American Petroleum Inst. et al. v. SEC*, No. 12-1668 (D.D.C. 2013). The court also found that the SEC acted unreasonably in refusing to allow an exemption from the disclosure requirement in the case of payments to governments whose domestic law forbids such disclosures. The SEC brief defending its approach to implementing Section 1504 is available at www.state.gov/s/l/c8183.htm. Several members of the U.S. Senate—including Senators Cardin and Lugar who authored the provision—urged the SEC to engage in additional rulemaking to reinstate the rule, suggesting that with further elaboration of its rationale, the SEC could properly maintain the public disclosure requirement, without any exemption for payments to governments prohibiting such disclosures, and still satisfy the district court’s concerns. The letter from these U.S. senators to the SEC is available at www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-2.pdf. The SEC declined to appeal the district court’s decision vacating the rule and will instead promulgate a revised rule.

6. Extractive Industries Transparency Initiative (“EITI”)

On December 19, 2013, the United States submitted its application as a candidate for the Extractive Industries Transparency Initiative (“EITI”) Board. See *Digest 2012* at 412 regarding previous U.S. commitment to the EITI. The U.S. Department of the Interior issued a press release announcing the submission of the candidacy application, available at www.doi.gov/eiti/FACA/upload/USEITI-Application-Background.pdf and excerpted below. The application is available at www.doi.gov/eiti/upload/USEITI-Candidacy-Application-MSG-Approved-2.pdf.

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The EITI is a voluntary, global effort designed to increase transparency, strengthen the accountability of natural resource revenue reporting, and build public trust for the governance of these vital activities. Participating countries publicly disclose revenues received by the government for oil, gas, and mining development, while companies make corresponding disclosures regarding these same payments to the government, and both sets of data are reviewed and reconciled by a mutually agreed upon independent third party. Results are then released in a public report.

The design of each nation's EITI framework is country-specific and developed jointly by a Multi-Stakeholder Group comprised of members of the public, government and industry through a multi-year, consensus-based process. In addition to increased transparency, EITI strengthens accountability, empowers citizens, and adds another tool in the fight against corruption. ...

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7. Tax Treaties

As discussed in *Digest 2012* at 413, the United States has been actively engaging with countries around the world to improve international tax compliance and implement the Foreign Account Tax Compliance Act ("FATCA"). In 2013, the United States concluded bilateral agreements or signed joint statements to implement FATCA with France, Japan, Germany, Spain, Norway, Switzerland, and Ireland. The texts of the joint statements and signed agreements are available at www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

Cross References

Detroit International Bridge, **Chapter 5.A.**

Business and human rights, **Chapter 6.F.**

ILC's work on topic of most-favored-nation clauses, **Chapter 7.D.3.**

Organization for Economic Cooperation and Development, **Chapter 7.E.2.**

ICAO and Taiwan, **Chapter 7.E.5.**

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitrations, **Chapter 15.A.**

BG Group PLC v. Argentina (challenge to award in BIT arbitration), **Chapter 15.E.1.**

UN Group of Government Experts in Information and Telecom, **Chapter 18.A.4.b.**